DEPARTMENT OF THE AIR FORCE
Office of the General Counsel
Contractor Responsibility (SAF/GCR)
Office of Fraud Remedies

FRAUD REMEDIES REFERENCE GUIDE

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ROLE OF ACQUISITION FRAUD COUNSEL

I. Air Force Instruction 51-1101

The Air Force has a substantial interest in assuring the successful prosecution of fraud against the Air Force. Fraud adversely affects Air Force contracts, programs, appropriations, and equipment, and it can imperil the lives of Air Force personnel. Further, fraud undermines the paramount goal of achieving the best value for the Air Force.

Because combating fraud is so critical, Air Force Instruction 51-1101 (AFI 51-1101) requires major commands, field operating agencies, and direct reporting units to designate attorneys to perform the duties of Acquisition Fraud Counsel (AFC). *See* AFI 51-1101, ¶¶ 1.1.3, 1.1.6.1.

The AFC is the principal Air Force lawyer responsible for representing the Air Force in fraud litigation and has a key role in the war against fraud. An AFC must have a variety of abilities and attributes, but especially initiative, good judgment, ability to deal with people from other departments and agencies, aptitude in verbal and written communication, and a wide range of legal knowledge. There are few legal positions in the Air Force requiring as much breadth and depth of experience and ability as the role of the AFC.

II. Fundamentals of the AFC Position

Throughout the course of a fraud case, the AFC must do the following to assure the Air Force receives the highest level of representation:

- Thoroughly understand the case—the facts, witnesses, documents, evidence and legal issues
- Prepare a fraud remedies plan, with an emphasis on developing a plan for supporting the litigation of the case
- Assist the Department of Justice (DOJ) to the maximum extent
- Provide SAF/GCR with recommendations for suspension and debarment, including (i) marshalling the evidence supporting the recommendation and (ii) commenting on the possible impact of suspension/debarment on the conduct of pending fraud litigation
- Evaluate the case for settlement
- Follow through on recovery of a judgment or settlement

All of these actions are essential to the successful litigation of a fraud case. With the exception of recommending suspension or debarment, these are the same types of actions that in-house lawyers for private companies typically perform in support of litigation.

III. Establish Regular Contact with Key Players

The AFC should become acquainted with the key players who work on fraud issues in the region—the OSI investigators, the local Assistant U.S. Attorneys (AUSA), the regional fraud counsel for the Defense Contract Management Agency, and personnel in the Defense Contract Audit Agency's regional offices. These are the people who regularly investigate and prosecute procurement fraud. Even if the AFC does not have an active fraud case, maintaining regular contact with these people can pay dividends when there is an active case. The AFC should also maintain routine contact with the local contracting officers and program officers, who also play an essential role in prosecuting fraud.

IV. Understanding the Case

A. Take the initiative

To acquire a good understanding of the case, it is always necessary to discuss the case with the contracting officer and knowledgeable persons working with the program; they are the persons with firsthand knowledge. There is no way that the AFC can understand the case without the assistance of the contracting officer and the program officer.

The AFC must take the initiative to contact these people. The job of AFC is not a passive job, and the importance of taking the initiative cannot be stressed enough. There is an old Chinese proverb: "A peasant can stand by the roadside with his mouth open for a very long time before a roast duck will fly into his mouth." Consistent with this admonition, the AFC cannot wait for the phone to ring or for evidence to arrive miraculously on his or her doorstep. The AFC must take the initiative and not sit back and wait for something to happen.

In all discussions with investigators, other Air Force personnel, and lawyers from the Department of Justice, the AFC should always be careful to preserve the attorney-client and work product privileges. *See, e.g., Upjohn v. United States*, 449 U.S. 383 (1981); *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 245, 252 (D.C. Cir. 1977) (applying the attorney-client privilege with full force to agency employees' communications with the agency's attorneys).

Generally, even for preliminary discussions, it is preferable to speak separately with potential witnesses—such as the contracting officer or the program officer—so as to avoid a possible defense argument that the government's witnesses used group discussions to "improve" their memories by reciprocal reinforcement and suggestive

comments. There are, however, exceptions to this general rule when more than one person is needed to explain a subject requiring special expertise at multiple levels.

At the outset of any case or investigation, the AFC should advise all Air Force personnel involved with the program or the contract to preserve all relevant records and to suspend normal document destruction. Records include electronic records, such as emails, which in some information systems are deleted when a user logs off, unless the user elects to save them.

Criminal cases often present a special problem for the AFC. When there is a pending criminal investigation or prosecution, it may be impossible for the AFC to acquire a complete understanding of the case until completion the criminal case. This is because Fed. R. Crim. P. 6(e) prohibits the prosecutor from disclosing matters occurring before the grand jury. In such cases, the AFC's research of the case necessarily will be limited to information that is available from other sources apart from matters occurring before the grand jury. However, in most cases this disability will not prevent the AFC from proceeding with his or her role in the case. In this regard, the AFC operates under the same disability as the DOJ lawyer handling the civil side of a fraud case that is also being investigated or prosecuted as a criminal case. Even when there is a parallel criminal case, usually there will be sufficient information available for the AFC to acquire a reasonably good understanding of the case.

B. Analyze according to the taxonomy of fraud cases

Fraud cases come in all sizes and shapes and can be as varied as the human imagination. However, most procurement fraud falls into one of the following six categories:

Mischarge case The common element of mischarge cases is a claim for goods or services that were not provided in the manner stated in the claim: for example, submitting an invoice for goods or services that were not delivered or performed, or billing for higher priced goods or services than actually provided.

Fraud-in-the-inducement case This includes a variety of situations arising from the contractor's false statements or actions that induce the government to agree to inflated prices. The defective pricing case, in which the contractor's submission of false data causes the government to pay inflated prices, is an example of a fraud-in-the-inducement case.

False certification case In these cases, the contractor makes a false certification of compliance with a statute, regulation or contract clause. For example, the contractor certifies that a product was tested in accordance with mandated procedures or specifications, when the product was not so tested.

Substandard product or service case The substandard product or service case involves the contractor delivering an inferior substitute in place of the product required

by the contract. These cases often overlap with the mischarge case and the false certification case.

Fraudulent accounting case In government contracting, accounting fraud usually involves creative accounting to make an unallowable cost look like an allowable cost. For example, un-reimbursable costs are shifted from a fixed price contract to a cost reimbursable contract.

Reverse false claims case In a reverse false claims case, the defendant makes false statements or commits fraudulent conduct to decrease an obligation that he owes to the United States.

One way to simplify a fraud case is to think about these six main types of false claims cases. Analyzing and summarizing the fraud in terms of one or more of these six categories will often make the case easier to understand.

C. Think about the elements of a false claims case

Although false claims are not the only types of procurement fraud cases, almost all procurement fraud cases (criminal or civil) include a claim that the defendant violated either the criminal statute prohibiting false, fictitious or fraudulent claims, 18 U.S.C. § 287, or the civil False Claims Act, 31 U.S.C. § 3729. These statutes have the following elements:

- The defendant submitted a claim.
- The claim was submitted to the United States or a department or agency thereof.
- The claim was false, fictitious or fraudulent.
- The defendant acted knowingly.
- The falsity was material to the fraud—*i.e.*, the falsity was likely to mislead the government.

D. Start with the claim and work backwards

Because there cannot be a false claims case without a claim, one useful way to analyze a fraud case is to start with the claim and work backward chronologically, assessing along the way whether (i) the claim was false; (ii) knowingly false; and (iii) material to the government's decision. Often, there is a relatively clear path, but not always. For example, in some accounting fraud cases, the contractor illegally shifts costs from a fixed price contract to a cost reimbursement contract. In such a case, the claim is the request for reimbursement submitted in the cost reimbursable contract, but the path from that claim (request for reimbursement) leads back to an entirely different contract, the fixed price contract where the costs were actually incurred.

An example of accounting fraud occurred in *United States v. Newport News Shipbuilding, Inc.*, 276 F. Supp. 2d 539 (E.D. Va. 2003), in which the contractor misclassified design costs incurred in performing commercial shipbuilding contracts as independent research and development (IR&D) costs, so that the government, not the commercial customer, would pay for the great bulk of the costs. The claims were the contractor's year-end indirect cost proposals submitted to the government certifying that the claimed IR&D costs were allowable costs in accordance with the Federal Acquisition Regulation. However, the path from those claims led back to the commercial shipbuilding contracts.

There is simply no question that a clear understanding the claim is an essential starting point in the analysis of any procurement fraud.

E. Look for the lie

Always look for the lie! As complicated as fraud cases may seem, they all involve the simple fact that the contractor lied. It is the lie that made the fraud work, and without the lie there would have been no fraud. Everyone intuitively comprehends the concept of a lie. The contractor, of course, may have enshrouded the lie in layers of deception, but there was a lie, nonetheless. Think of yourself as an archeologist digging for the lie buried at the core of the fraud. Once you have found it, you will understand the case, and be able to help others understand the case. The rest—witnesses, documents, details—will fall into place. Looking for the lie is a technique that keeps you mentally focused when digging through the data.

V. Develop a Fraud Remedies Plan

AFI 51-1101 requires the AFC to prepare a fraud remedies plan. The fraud remedies plan is a litigation plan, or a battle plan, that will assist Air Force lawyers, especially the AFC, throughout the litigation and in suspension and debarment proceedings.

The fraud remedies plan is mainly for the AFC's own benefit. It is a guide to help the AFC understand his or her case—*i.e.* the possible causes of action, the elements of the causes of action, the principal witnesses, the key documents, and the strong and weak points of our case. It is a planning document that points toward a successful resolution of the case. The AFC should prepare the fraud remedies plan as if he or she were trying the case. This is the best way to assure that the plan will be useful to the lawyers at the DOJ and to the Air Force's debarring official. A good fraud remedies plan, *inter alia*, enables the AFC to:

(i) provide timely information and assistance to the DOJ, especially in understanding the contract and the contract law issues;

(ii) recommend to SAF/GCR whether the government should intervene in a *qui tam* case;

(iii) assess damages and recommend settlement; and

(iv) assist SAF/GCR in determining the Air Force's position in litigation and in suspension and debarment actions.

The fraud remedies plan is a base-line litigation document that helps the AFC develop a theory of the case. It is a basic axiom of litigation that a lawyer must develop a persuasive theory of the case. The theory of the case is like the keel of a ship to which everything else relates—except that in litigation it is a conceptual structure, not a physical structure. However, it has the same high degree of importance to the success of the enterprise. When developing a theory of the case, it is useful to think of the opening statement at trial. What would you say to the judge and jury about the case? How would you concisely explain the Air Force's position on the issues in dispute so that the listener (reader) understands our theory of the case with minimal effort?

Usually, the theory of the case will evolve over time, and for that reason the fraud remedies plan may evolve. This evolutionary process is characteristic of litigation plans. A fraud remedies plan, like any litigation plan, is not set in concrete. It will undergo changes as the investigation proceeds. This is entirely consistent with the basic idea that preparing the fraud remedies plan is an exercise that helps the AFC develop a winning theory of the case.

VI. Assist the DOJ

One of the AFC's most important duties is to assist the lawyers at the DOJ. In this regard, the AFC's knowledge of federal procurement law plays a critical role. An AFC need not be a trial lawyer or an expert on fraud to ably assist the DOJ. Indeed, it is more important that the AFC have a good working knowledge of federal procurement law and its application to the contract and program in dispute. The AFC can provide valuable assistance to lawyers at the DOJ by explaining the contract, the acquisition program, and how the contractor's actions were fraudulent in the context of the contract. AUSAs know how to try a case. They know how to examine witnesses, how to introduce exhibits, how to authenticate documents, how to argue a motion before a judge. What they do not know, until we educate them, are the contract law issues such as the important clauses in the contract, the nature of the acquisition program, the specific procurement law issues, the key documents, and the main players at the Air Force. These and other contract-related topics are the AFC's home ground.

A. Assemble the relevant documents

The AFC should assemble the relevant Air Force documents and organize them in a way that facilitates the AUSA's review of them. Usually, but not always, the documents will be organized in chronological order. Sometimes it is more sensible to organize the documents according to subject—*i.e.*, all documents relating to contracting actions in one set; all documents relating to product testing in a second set; all documents relating to payment in a third set. The AFC should provide the pertinent documents in a file similar to the "Rule 4" file used in litigation at the Armed Services Board of Contract Appeals. However, the AFC should use judgment and discretion in assembling documents, and be aware that dumping an undifferentiated mass of undigested documents on an AUSA is not helpful and may only delay the case.

B. Take the lead for the Air Force in responding to written discovery

In criminal cases, Fed. R. Crim. P. 16 permits discovery, but the permitted discovery is significantly narrower than in civil cases. In contrast, in civil cases there are initial mandatory disclosures and formal discovery, and often responding to discovery is burdensome in civil cases. The AFC must take the initiative in preparing the initial mandatory disclosures and in drafting responses to discovery requests, under the AUSA's supervision. The AUSA, who is initially unfamiliar with the Air Force's organization chart and documents, cannot be expected to take the lead in responding to mandatory disclosures and discovery requests.

1. Mandatory disclosures

Absent agreement of the parties, Fed. R. Civ. P. 26(a) requires mandatory disclosure of certain information, without awaiting a discovery request. These mandatory disclosures are distinct from traditional discovery consisting of interrogatories, requests for documents, requests for admissions, and depositions. Initial disclosures consist of the following:

- The name, address, and phone number of each person likely to have discoverable information that the disclosing party may use in support of its claims or defenses, including a topical summary of the information.

- A copy, or description by category and location, of all documents or data compilations that the disclosing party may use to support its claims or defenses.

- A computation of every category of damages claimed by the disclosing party, including access to the documents or other evidence on which the computation is based.

- Copies of all applicable insurance agreements.

The date for providing mandatory disclosures is governed by local rule, but in most districts mandatory disclosures are due shortly after the defendant has answered the complaint. This means that the AFC must expeditiously prepare draft mandatory disclosures for the AUSA's review.

2. Discovery

Absent a court order or agreement of the parties, there is no formal discovery until after the initial mandatory disclosures discussed above. Discovery in federal court is broad, but not unlimited. Fed. R. Civ. P. 26(b) provides:

> *Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." (Underscoring supplied.)*

Thus, it is not sufficient to object that requested discovery is not relevant. The governing standard is whether the requested discovery will "lead to the discovery of admissible evidence," and the proper objection is that the requested discovery is neither relevant nor likely to lead to the discovery of admissible evidence.

Parties often object on the grounds that discovery is unreasonably burdensome and oppressive. If the government objects that discovery is burdensome, then it must be able to support the objection with specific facts, such as estimates of the volume of documents that must be searched and the staff hours required to conduct the search. These estimates must be supported by the testimony of witnesses and cannot be pulled from thin air. It is the AFC's job to marshal the evidence necessary to support objections to discovery.

The AUSA cannot sign answers to interrogatories. Fed. R. Civ. P. 33(b)(2) expressly provides that "[t]he answers are to be signed by the person making them"—that is, by a person with firsthand knowledge of the answer. Thus, the AUSA cannot sign answers to interrogatories. Nor should the AFC sign answers to interrogatories. The person signing should be someone with firsthand knowledge who could testify to the facts if called as a witness—usually that is the contracting officer and/or someone from the program office. Depending on the scope of the interrogatories, it may be necessary for more than one person to sign them. Without leave of court or written stipulation, a party may not serve more than 25 interrogatories, including discrete subparts. Fed. R. Civ. P. 33(a). When preparing draft answers to interrogatories, the interrogatory should be stated verbatim followed by the answer. This is the customary format that is required by the local rules of many federal district courts. This same format is typically used when responding to requests for documents and requests for admissions.

Keep in mind that Fed. R. Civ. P. 33(d) permits a litigant to answer interrogatories by producing business records, if the answer can be ascertained from business records and if the burden of ascertaining the answer is essentially the same for the party serving the interrogatory as for the party answering the interrogatory. When appropriate, producing business records can be a convenient, less time-consuming way to respond to interrogatories.

Although a few federal district courts limit the number of requests for documents, most do not do so, and, therefore, absent agreement of the parties, there is usually no limit on the number of document requests. This means that responding to requests for documents often can be burdensome.

3. Preserving privileges

The AFC must assure that privileged information is not disclosed. Disclosure of privileged information waives the privilege as to the disclosed information and may waive the privilege as to the subject of the information, meaning that the privilege may be waived as to all documents and communications on the same subject. *See, e.g., Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 883-84 (1st Cir. 1995).

If a litigant objects to discovery on the grounds of privilege, then the litigant must provide a privilege log asserting the privilege with particularity and describing the nature of the privileged communication in a manner that, without disclosing the privileged communication, enables other parties to assess the applicability of the privilege. Fed. R. Civ. P. 26(b)(5). It is the AFC's responsibility to prepare the privilege log. This job cannot be imposed on the AUSA who is not familiar with the Air Force's internal communications and record keeping practices.

C. Help the AUSA understand the case

An AUSA cannot understand a procurement fraud case without understanding the program and the contract law issues. These are topics that the AFC understands. The AFC is familiar with the program and the contract, and routinely advises the contracting officer and the program office on legal issues. Do not let an AUSA flounder with contract and program issues. Make it easy for the AUSA by explaining the basic facts and the contract issues. The AFC should use his or her specialized contract law experience to lead the AUSA through the morass of contract clauses, specifications, requests for payments, and the like. This is the most valuable role that an AFC can perform.

VII. Recommend Suspension and Debarment

Suspension and debarment are important fraud remedies. In some cases they may be the only available remedies. DOJ focuses on larger litigation and often declines prosecution of smaller cases. Therefore, in some instances suspension and debarment

are the only effective remedies. The AFC should always send to SAF/GCR a recommendation on suspension and debarment. The recommendation need not be elaborate, but should include a summary of the relevant facts and copies of the key documents. Keep in mind that the suspending/debarring official can rely on hearsay that would not be admissible in court. Therefore, part of the evidentiary basis for suspension or debarment may consist of investigators' reports.

VIII. Evaluate Settlement

In today's environment, most procurement fraud cases are disposed of by plea or settlement. It is important for the AFC to evaluate settlement and to provide a recommendation to the AUSA and to SAF/GCR.

In civil cases, the AFC should consider the two broad categories of risk: liability risk and collection risk. When evaluating the case for settlement, we typically discount our claim to account for these two types of risk; doing so always requires the exercise of subjective judgment. There will be cases in which we have a strong case on liability. However, if the contractor is in precarious financial condition and unlikely to pay a substantial judgment, then we would substantially discount our settlement offer, notwithstanding our strong case on liability.

The AFC should discuss both types of litigation risk with the AUSA and reach a preliminary consensus on the settlement offer. DOJ often does a financial analysis to determine if the defendant has the ability to pay a judgment or settlement. If DOJ does a financial analysis, then the AFC should review and discuss it with the AUSA and the Director of the Office of Fraud Remedies at SAF/GCR.

When settling a civil fraud case, the AFC should request the DOJ to send the Air Force a letter recommending settlement, including the rationale for settling at a certain amount. The AFC should forward that recommendation to the Director of the Office of Fraud Remedies at SAF/GCR. All settlements must be approved by the Deputy General Counsel for Contractor Responsibility.

IX. Follow Through

After settlement or judgment, it is important to follow through to assure that the Air Force receives the correct portion of the recovery.

If there is an appropriation to which a recovery can be credited, then actual damages are paid to the affected program. If the appropriation affected by the fraud is still open, then the recovery should be credited to that open appropriation and used for new obligations consistent with the appropriation. If the appropriation has expired, the recovery can be credited to the expired appropriation, but it can be used only to adjust prior obligations incurred when the appropriation was open. If the appropriation is closed, then the Air Force cannot receive the recovery, which instead is deposited to general receipts at the Department of the Treasury, as are the double or treble portions

of the recovery and any penalties. When determining whether the Air Force can lawfully share in a fraud recovery, the AFC should consult a fiscal law specialist.

PREPARING A FRAUD REMEDIES PLAN

Air Force Instruction 51-1101

AFI 51-1101 requires preparation of a fraud remedies plan in all matters involving significant procurement fraud. The AFI defines significant procurement fraud as alleged or confirmed instances of misconduct by a government contractor or individual that satisfies one or more of the following criteria:

- All procurement-related fraud cases that involve an alleged or actual loss to the Air Force of $100,000 or more.
- All corruption cases related to the Air Force procurement process, regardless of the dollar amount of loss involved.
- All Air Force cases involving alleged or proven defective products or product substitution where the nature of the defect or substitution presents a serious hazard to health, safety, or operational readiness, regardless of the dollar amount of loss involved.
- All cases in which there is a significant Air Force interest as determined by the Deputy General Counsel for Contractor Responsibility (SAF/GCR), including but not limited to those involving a congressional inquiry or substantial media attention.

As can be seen, AFI 51-1101 applies to a broad range of wrong doing by contractors, subcontractors, and their employees and agents.

AFI 51-1101 requires preparation of a fraud remedies plan upon notice from SAF/GCR. Appendix A is the currently recommended format for a fraud remedies plan. The content of the plan will vary depending on the scope of the case under consideration.

As with all good legal writing, a fraud remedies plan should follow the ABCs of legal writing: **A**ccuracy, **B**revity and **C**larity.

The Fraud Remedies Plan is a plan for litigation, administrative actions, such as suspension and debarment, and for contracting actions aimed at remedying fraud.

An important threshold point to keep foremost in mind is the fraud remedies plan's primary purpose is not to satisfy a reporting requirement to a higher echelon. A fraud remedies plan is a litigation plan. It is a battle plan that will assist Air Force lawyers—and especially the Acquisition Fraud Counsel (AFC)—throughout the litigation and in suspension and debarment proceedings. The fraud remedies plan is mainly for the AFC's own benefit.

All competent lawyers prepare litigation plans to guide them in the conduct of litigation. Litigation plans have varying degrees of formality, detail and complexity. Some are relatively informal and some, in large litigation, may fill up a big three-ring notebook. The format for the fraud remedies plan shown in Appendix A emphasizes analyzing the contract law issues. The fraud remedies plan is a guide to help the AFC understand his or her case—*i.e.* the possible causes of action, the elements of those causes of action, the principal witnesses, the key documents, and the strong and weak points of our case. It is a planning document that points toward a successful resolution of the case. The AFC is the contract law advisor to DOJ, and the AFC should prepare the fraud remedies plan to provide useful contract law advice to DOJ's lawyers.

The AFC Is the Primary User of the Fraud Remedies Plan

A fraud remedies plan is a working document that assists the AFC in assessing the strengths and weaknesses of our case. As mentioned, the AFC is the principal user of the fraud remedies plan. A good fraud remedies plan, *inter alia*, enables the AFC to:

(i) provide timely information and assistance to the DOJ;

(ii) recommend whether the government should intervene in a *qui tam* case;

(iii) assess damages and recommend settlement; and

(iv) assist SAF/GCR in suspension and debarment actions.

Preparing a Fraud Remedies Plan Helps the AFC Develop Our Theory of the Case

It is a basic axiom of litigation that a lawyer must develop a persuasive theory of the case. For example, in a murder case an alibi defense is fundamentally different than the defense of self-defense, and the two theories cannot be mixed in one case without disastrous results. While in procurement fraud litigation the contrast among differing theories may not be as stark as in the homicide example, the same principle of establishing a theory of the case applies in procurement fraud litigation. For example, the False Claims Act, 31 U.S.C. § 3729, requires the government to prove that the defendant "knowingly" made a false claim. On this element of *scienter*, our theory might be that the contractor had actual knowledge of the fraud. On the other hand, we might proceed on the theory that even though the contractor had no actual knowledge of fraud, nonetheless, the contractor was willfully ignorant of the fraud. Alternatively, we could proceed on yet a different theory that there were indications of fraud—red flags—creating a duty to inquire; and the contractor was reckless in failing to inquire.

The theory of the case is like the keel of a ship to which all else relates—except that in litigation it is a conceptual structure, not a physical structure. However, it has the same high degree of importance to the success of the enterprise. When developing a theory of the case, it is useful to think of the opening statement at trial. What would you say to the judge and jury about the case? How would you concisely explain the Air

Force's position on the issues in dispute so that the listener (reader) understands our theory of the case with minimal effort?

The theory of the case may evolve over time, and the fraud remedies plan may evolve. This evolutionary process is characteristic of litigation plans. A fraud remedies plan, like any litigation plan, is not set in concrete. It will undergo changes as the investigation proceeds. This is entirely consistent with the basic idea that preparing the fraud remedies plan is an exercise that helps the AFC develop a winning theory of the case.

The AFC's Knowledge 0f Federal Procurement Law Plays a Critical Role

An AFC does not have to be a trial lawyer or an expert on fraud actions to prepare a good fraud remedies plan. Rather, it is more important that the AFC have a good working knowledge of federal procurement law. Assistant U.S. Attorneys (AUSAs) know how to try a case. They know how to examine witnesses, how to introduce exhibits, how to authenticate documents, how to argue a motion before a judge. What they do not know, until we educate them, are the contract law issues such as the important clauses in the contract, the nature of the acquisition program, the specific procurement law issues, and the key players at the Air Force. These are precisely the topics that the AFC knows:

What is the Air Force buying?

What is the history of the program?

What has been our past experience with the contractor?

What is the type of contract—*i.e.* fixed price, cost-plus, etc.?

What contract clauses have a bearing on the litigation?

- payment clauses
- delivery clauses
- specifications
- quality assurance clauses
- clauses governing labor rates

Does the suspected fraud concern cost principles?

Are actions of a subcontractor relevant to the suspected fraud?

What are the key documents and how should they be construed?

What is the impact of the fraud on safety of flight?

These and other contract-related topics are the AFC's home ground. At a minimum, the AFC should discuss the case with the contracting officer, personnel from the program office, and, in accounting fraud cases, the DCAA auditor. The AFC also should have regular discussions with the OSI or DCIS agent and the AUSA assigned to the case.

Make It Easy for the AUSA

AUSAs are busy lawyers, and usually they do not specialize in procurement fraud cases. Their work ranges over many subjects. An AUSA cannot begin to comprehend a procurement fraud case until he or she understands the contract law and the program. For the AUSA, it is precisely this part of the case that is the toughest, most forbidding feature of any new procurement fraud case. We must make it easy for the AUSA by educating the AUSA on these issues. It is in performing this role that the AFC can be most valuable. Do not let an AUSA flounder with these contract and program issues. Make it easy for the AUSA by cogently explaining in the fraud remedies plan the basic facts and the contract issues.

The AFC should use his or her specialized contract law experience to lead the AUSA through the thicket of contract clauses, specifications, requests for payments, and the like. The AFC should assemble and organize the key documents available to the Air Force—*e.g.*, the contract, the claim, test and inspection reports, and so forth—and index them for the AUSA. The package should be similar to a "Rule 4" file in an ASBCA appeal. However, it should include only documents that are relevant to the fraud, and not every document in the contracting officer's file. A massive "data dump" on the AUSA does not help.

By organizing the key documents, the AFC can greatly improve the AUSA's understanding of the case and enhance the probability that DOJ will ably prosecute (or defend) Air Force cases. All too often DOJ takes many years to decide whether to prosecute a fraud case, and in the interim witnesses change jobs, investigators are reassigned, and the case becomes stale. Such delays can be remedied in part by greater support from the AFC. If we make it easy for DOJ to litigate our cases, then we will get better, faster results for the Air Force in both criminal and civil litigation.

Simplify: Penetrate The Thicket Of Documents, Witnesses, and Data

Several years ago, there was a popular movie entitled *Philadelphia*, starring Tom Hanks and Denzel Washington. Hanks was a bright, up-and-coming associate with a prominent law firm until the firm learned that he had AIDS and fired him. He decided to sue his former employer and searched high and low for a lawyer to represent him, but was shunned by all until he finally ended up with Denzel Washington, an ambulance

chaser with not exactly a silk-stocking practice. Washington had a favorite and memorable comment to new clients: "Explain what happened so that my six-year old daughter could understand it." Denzel Washington's adage is sound advice. Simplify the case so that an AUSA, who is not a procurement law specialist, can understand the procurement fraud with minimum effort. Even if the facts are complex, set forth in the fraud remedies plan a simplified summary of the case.

It is usually helpful to prepare a chronology in outline form of the key dates and events, with a brief description of the event and a citation to the source of the information. This chronology is expanded as the AFC proceeds with the case and is a valuable adjunct to the fraud remedies plan.

The Six Main Types of False Claims Act Cases

One way to simplify a fraud case is to think about the six main types of false claims cases. Although there are a medley of crimes and causes of action that can be alleged in fraud cases, typically there is an allegation under either the criminal false claims statute, 18 U.S.C. § 287, or the civil False Claims Act, 31 U.S.C. § 3729, *et seq.* Most false claims cases fall into six general categories, and it is useful to think of these six categories when analyzing a fraud case.

1. **"Mischarge" case**

The common element of mischarge cases is a claim for goods or services that were not provided in the manner stated in the claim. For example, submitting an invoice for goods or services that were not delivered or performed, or billing for higher priced goods or services than actually provided.

2. **"Fraud-in-the-inducement" case**

This includes a variety of situations arising from the contractor's false statements or actions that induce the government to agree to inflated prices. The defective pricing case, in which the contractor's submission of false data causes the government to pay inflated prices, is an example of a fraud-in-the-inducement case.

3. **"False certification" case**

In these cases, the contractor makes a false certification of statutory or regulatory compliance. For example, the contractor certifies that a product was tested in accordance with mandated procedures or specifications, when the product was not so tested.

4. **"Substandard product or service" case**

The substandard product or service case involves the contractor delivering an inferior substitute in place of the product required by the contract. These cases often overlap with the mischarge case and the false certification case.

5. **"Fraudulent accounting" case**

In government contracting, accounting fraud usually involves creative accounting to make an unallowable cost look like an allowable cost. For example, un-reimbursable costs are shifted from a fixed price contract to a cost reimbursable contract.

6. **"Reverse false claims" case**

In a reverse false claims case, the defendant makes false statements or commits fraudulent conduct to decrease an obligation that he owes to the United States.

Analyzing and summarizing the fraud in terms of one or more of these six categories will often make the case easier to understand.

Look for the lie!

When analyzing a fraud case, always look for the lie! What was the lie? Who lied? How did they lie? No matter how complex the facts, the heart of the matter is that someone lied, and the government relied on the lie to its detriment. The fraud remedies plan should describe the lie in simple terms.

Furthermore, all fraud cases share the common element of a falsehood, and, like Caesar's Gaul, all falsehoods can be divided into three types:

(i) false statements of material facts;

(ii) false conduct; and

(iii) fraudulent omission of material facts.

In procurement fraud cases, there are usually false statements, but not always. For example, in the typical bid-rigging case, the fraud is perpetrated by false conduct, not by false statements. Looking for the lie in terms of one of these three types of falsehoods will aid in analyzing and summarizing the fraud. No matter how convoluted the facts, the fraud remedies plan should be clearly describe the lie so that the reader easily understands the violation.

Establish a relationships with the AUSA

Although not directly related to the preparation of a fraud remedies plan, the AFC should establish a working relationship with the AUSA assigned to the case. Part of our mission as in-house counsel for the Air force is to support the lawyers at the DOJ—who represent the Air Force as our outside counsel. Lawyers at DOJ have many competing demands on their time. Making early contact with the AUSA and other lawyers at DOJ, and maintaining regular contact, will enable us to better understand what they need and how we can provide the maximum support to assure that our cases receive the proper level attention at DOJ.

SUSPENSION AND DEBARMENT

INTRODUCTION

General overview Suspension and debarment protect the government from doing business with contractors that are not "responsible." Each Executive Branch department and agency has delegated to a "suspending" and "debarring" official (S & D official) the authority to suspend and debar non-responsible contractors. Suspension or debarment has the immediate effect of making the contractor ineligible for new contracts or for federal assistance programs with all Executive Branch departments and agencies. That ineligibility is effectuated when the S & D official causes the contractor's name to be placed on the "GSA list," maintained on the Internet.[1] Contracting officers are required to review the GSA list prior to the award of new contracts.

Regulations The suspension and debarment regulations are found in the Federal Acquisition Regulation (FAR), Subpart 9.4.—"Debarment, Suspension, and Ineligibility." 48 CFR, Chapter 1, Part 9.

Suspension The government may suspend a contractor based upon "adequate evidence" that it has engaged in certain misconduct as stated in FAR 9.407-2. The suspension continues, with certain limitations, pending the completion of any investigation or legal proceeding. An indictment constitutes "adequate evidence" as a matter of law. FAR 9.407- 2(b). As a general principle, "adequate evidence" is analogous to probable cause.

Debarment A S & D official may debar a contractor if the contractor is convicted of a crime in connection with obtaining, attempting to obtain or performing a public contract. A S & D official may also debar a contractor if there is a civil judgment for fraud against the contractor in connection with obtaining, attempting to obtain, or performing a public contract. However, a conviction or civil judgment is not a necessary prerequisite to debarment. The government can debar a contractor for any misconduct if it is so serious as to affect the contractor's present responsibility. FAR 9.406(c). The debarment is for a specific period of time: "generally" no more than three years. FAR 9.406-4(a)(1).

ACTIONABLE MISCONDUCT

Most suspensions and debarments are based on the commission of a crime or civil fraud, poor contract performance, or other serious misconduct showing that the contractor is not responsible.

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[1] The GSA list is at http://epls.arnet.gov/.

Suspension

The government can suspend a contractor if the government has adequate evidence that the contractor engaged in the following conduct, as described in FAR 9.407-2(a):

- Commission of fraud or any crime in connection with obtaining, attempting to obtain or performing a public contract;
- Violating a federal or state antitrust law;
- Committing embezzlement, theft, forgery, bribery, falsification or destruction of records, false statements, tax evasion or receiving stolen property;
- Violating the Drug Free Workplace Act of 1988;
- Intentionally affixing the "Made in America" inscription to products that were not made in America;
- Committing an unfair trade practice; or
- Committing any other act showing a lack of business integrity or honesty that affects the contractor's responsibility.

An indictment constitutes adequate evidence, FAR 9.407-2(b). However, an indictment is not a prerequisite, and the government can suspend a contractor even though there is no indictment.

Debarment based on conviction or civil judgment

The government can debar a contractor if the contractor has been convicted of, or adjudged civilly liable for the following misconduct, as described in FAR 9.406-2(a):

- Commission of fraud or any crime in connection with obtaining, attempting to obtain or performing a public contract;
- Violating a federal or state antitrust law;
- Committing embezzlement, theft, forgery, bribery, falsification or destruction of records, false statements, tax evasion or receiving stolen property;
- Intentionally affixing the "Made in America" inscription to products that were not made in America; or

- Committing any other offense showing a lack of business integrity or honesty that affects the contractor's responsibility.

Fact-based suspension or debarment where there is no indictment, conviction or civil judgment

The government can also suspend or debar a contractor even though the contractor has not been indicted, convicted or adjudged civilly liable for the acts described above. For example, FAR 9.407-2(c) and FAR 9.406-2(c) permit the government to suspend or debar a contractor for any cause of a serious or compelling nature affecting the contractor's present responsibility. Similarly, FAR 9.406-2(b)(1)(i) permits the government to debar a contractor for failure to perform in accordance with the terms of a contract.

If there is a preponderance of evidence that the contractor has done any of the following, then the government can debar the contractor, even though there is no conviction or civil judgment:

- Willful failure to perform in accordance with the terms of a contract;
- A history of unsatisfactory performance of one or more contracts;
- Violating the Drug Free Workplace Act of 1988;
- Intentionally affixing the "Made in America" inscription to products that were not made in America;
- Committing an unfair trade practice; or
- A determination by the Attorney General that the contractor is not complying with the Immigration and Nationality Act.

Because the government can debar for a history of unsatisfactory performance of one or more contracts, this means that in appropriate circumstances, action can be taken against a contractor for a pattern of negligent performance on a single public contract. There is no need to show fraud or even reckless conduct.

Other serious cause—the catch-all provision

The government can suspend or debar a contractor based on "any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor." FAR 9.406-2(c); 9.407-2(c).

This provision provides wide latitude to the Air Force to determine whether a contractor's conduct requires suspension or debarment, and could even include conduct

that is neither criminal nor related to a public contract. A history of unsatisfactory performance on private contracts, for example, could indicate a lack of present responsibility requiring debarment under this "other causes" provision.

SCOPE OF DEBARMENT

Contractor Defined

A suspension or debarment action may be taken against any "contractor," which is defined as including any individual or entity that (a) "submits offers for or is awarded" Government contracts or subcontracts, or (b) "reasonably may be expected" to do so, and (c) agents of contractors. FAR 9.403. Debarment actions need not, therefore, be limited to persons having contracts with the Air Force, or even with the government.

The Air Force has often suspended or debarred persons and entities who were likely to seek Air Force contracts, by reason of their past interest in such contracts. The Air Force has also debarred Air Force members and employees who, under the circumstances, likely would seek government contracts in the near future.

Where justified by the evidence, the government can suspend or debar attorneys, accountants and consultants as "agents" of contractors.

Vicarious Liability

The government can suspend or debar not only contractors, but also those affiliated with and employed by contractors.

Affiliates Following a determination that a contractor has engaged in actionable misconduct, an "affiliate" of that contractor may also be debarred, if the affiliate is given notice and an opportunity to respond. FAR 9.406-1(b).[2]

Power to control Generally, persons and entities are affiliates of each other if either has the power to control the other, or a third party has the power to control both. FAR 9.403. For example, if the government debars the Widget Division of Superior Aircraft Parts Corporation, then, after giving proper notice, the government could also debar the whole company, Superior Aircraft Parts Corporation, and all of its other divisions. The initial debarment of the Widget Division would automatically include the Widget Division's subdivisions and organizational units. The debarment could be extended further to include officers and any persons or entities holding sufficient ownership interest so as to control Superior Aircraft Parts Corporation.

Imputed misconduct The government can suspend or debar a person or entity even if the person or entity has not directly committed any misconduct or is not an

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[2] Debarment is automatically extended, without the need for notice, to all divisions and organizational elements of a debarred contractor, unless the debarment is otherwise expressly limited. FAR 9.406-1(b).

affiliate of the wrongdoer, based on the imputation to them of the actionable misconduct of others. FAR 9.406-5. Considering again the Widget Division example, if Joe Jones, a Widget Division inspector, was caught signing false test certifications for widgets to be shipped to the Air Force, then Jones' misconduct may be "imputed" to the Widget Division because he was acting within the scope of his employment. On the other hand, any misconduct by Jones which was designed to personally benefit Jones, and not the Widget Division, could not be imputed to the Widget Division unless it was done with the "knowledge, approval, or acquiescence" of the management of the Widget Division. *See* FAR 9.406-5(a).

Reason to know of misconduct The Widget Division debarment could be extended further to include anyone "associated with"[3] the Widget Division, that "participated in, knew of, or had reason to know of" the Division's misconduct. FAR 9.406-5(b). Thus, John Brown, the Widget Division's Vice President of Operations, could arguably be debarred, for example, upon a finding that Brown was responsible for directing the Widget Division's shipment of 10,000 widgets a day to the Air Force, and that he knew that Jones was the Division's only inspector. Such could support a finding that Brown "had reason to know of" the Division's false testing certifications.

Practical Considerations

Contracts in process The general rule is that absent a contrary determination by the ordering activity, debarment has no effect on the continued performance of contracts or subcontracts in existence at the time of the debarment. FAR 9.405-1. However, under DFARS 209.405-1, unless an agency head makes a compelling need determination, DoD entities may not place orders exceeding guaranteed minimums under indefinite quantity contracts, nor may they place orders against Federal Supply Schedule contracts.

Compelling reason exception Further, the Air Force may enter into new contracts with contractors, even after they are debarred or suspended, if a determination is made that there is a "compelling reason" to do so. FAR 9.405(a). If, for example, the property or service is available only from the contractor in question or if the urgency of the requirement dictates use of the contractor in question, then there would be a compelling reason. *See* THE PRACTITIONER'S GUIDE TO SUSPENSION AND DEBARMENT, P. 56, n.222 (3rd ed. 2002). In the Widget Division hypothetical, the Air Force would be able to obtain widgets from the Widget Division, even after its debarment, if, for example, widgets are important to the Air Force mission, and there are no other sources reasonably available.

Narrowly tailored debarment The Air Force's business interests may also be protected by fashioning a debarment narrowly, as it generally does, to address only the entities and persons engaged in and/or responsible for the misconduct. Using the widget hypothetical described above, if false widget testing occurred at only one of the

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[3] "Associated" persons are defined to include officers, directors, shareholders, partners and employees. FAR 9.406-5(b).

Widget Division's production facilities, the debarment could be fashioned so as to name only that facility. The Air Force could continue to enter into new contracts for widgets produced at other Widget Division facilities. Such an approach would protect the Air Force from the dishonesty endemic to one of the contractor's facilities, while at the same time ensuring the Air Force's ability to obtain critical parts from the contractor's other facilities.

Debarment limited to specific products Finally, a debarment can be fashioned to name the commodity that was the subject of the misconduct, rather than the contractor that committed the misconduct. FAR 9.406-1(b). Thus, in our hypothetical, if the Air Force had a continuing need to purchase gyroscopes manufactured by the Widget Division, but could find alternate sources for widgets, the debarment could be limited to widgets. Again, such an approach—narrowly limiting the debarment to the source of the misconduct—would protect the Air Force from potential future dishonesty, while at the same time insuring the Air Force's ability to obtain needed parts.

PROCEDURE

Referral to SAF/GCR Once evidence is obtained supporting a reasonable belief that a contractor may have committed actionable misconduct, the evidence is referred to the Secretary of the Air Force, Deputy General Counsel for Contractor Responsibility (SAF/GCR), in the manner set forth in the Defense Federal Acquisition Regulation Supplement (DFARS). DFARS 209.406-3. The information listed in the DFARS is important to our analysis of the allegations, but is not required in all cases. Furthermore, the formal DFARS referral need not be the first contact with SAF/GCR. Reporting persons are encouraged to contact SAF/GCR at the earliest opportunity, as are contractors seeking to avoid debarment. Contact Richard Pelletier, Assistant Deputy, at: (704) 588-0049, DSN 425-0049, fax (703) 588-1045, DSN fax 425-1045, or via email at Richard.Pelletier@pentagon.af.mil.

Analysis of the evidence The most useful information in the referral is the analysis of the evidence. A referral that says "Joe Jones falsely certified that he had tested widgets" is far less useful, for example, than one that describes the evidence supporting that conclusion. The former, which merely states the violation, requires follow-up research and results in delay. A well-prepared description of the evidence often enables SAF/GCR to take immediate action. It is also helpful to have the referring person's email address so that we may quickly obtain additional information. If a fraud remedies plan has been prepared, it should be included in the information sent to SAF/GCR.

Notice to contractor Once it has been determined that there is evidence of misconduct that requires action, SAF/GCR sends a letter to the contractor. The letter notifies the contractor that it is suspended or proposed for debarment, sets forth the effects of the suspension or debarment, and advises the contractor of its rights. The

contractor's name is then posted onto the General Services Administration's web site, signifying the person's immediate ineligibility for new contracts.

Contractor's response Responses are usually received from the contractor or its attorney within the 30 day period required by the FAR. Before making a submission in opposition to the suspension/debarment, the contractor usually will request and receive a copy of the administrative record. The administrative record contains the information relied upon in reaching the decision to suspend or propose debarment. Privileged communications and other information not relied on are not included within the administrative record and are not provided to the contractor. The referring party should advise SAF/GCR at the time of the referral of any information that the person believes should not be provided to the contractor, and, therefore, should not be shown to the suspending/debarring official or considered in the suspension or debarment decision.

There is no right to discovery beyond the right to a copy of the administrative record on which the suspension or debarment is based.

The contractor typically provides a written submission in opposition to the suspension or proposed debarment, in which the contractor either disputes the facts of the misconduct as stated in the notice or concedes the facts. Where the facts are not contested, the contractor will usually set forth information, which, it contends, establishes its present responsibility in spite of the misconduct.

Disputed Facts

Meeting with contractor If a contractor disputes the facts asserted in the debarment or suspension notice, the contractor typically will set forth his version of the facts in a written submission. The contractor may also request a meeting with the S & D official, which generally is granted. The judge advocate, contracting officer and/or investigator familiar with the proposed action are welcome to attend these meetings, and are encouraged to provide information in response to the contractor's submission.

Closure of record After the administrative record is closed, a determination is made as to whether the facts initially alleged in the notice of suspension or notice of proposed debarment continue to meet the relevant standard, in light of the information provided by the contractor. If the facts no longer provide "adequate evidence" for a suspension, or no longer establish a basis for debarment by a "preponderance of the evidence," the suspension or proposed debarment is terminated. FAR 9.407-2(a); FAR 9.406-2(b)(1).

Fact-finding In actions based on an indictment, conviction or civil judgment, disputes of the underlying facts raised by the contractor in its submissions will not raise a genuine dispute of material fact, because such judicial actions provide sufficient bases for suspensions and debarments, as a matter of law. FAR 9.406-3(d). However, in a "fact-based" action, if the S & D official decides the contractor has raised a genuine

dispute of material fact as to each basis for a suspension or proposed debarment,[4] then the S & D official may conduct, or refer the matter to another official to conduct, a fact-finding proceeding and to make findings of fact. FAR 9.406-3(d).[5] The S & D official will then reach a decision based upon the findings of fact. FAR 9.406-3(d)(2)(ii); 9.407-3(d)(2)(ii).

Duration of suspension/debarment If it is determined that an action is required to protect the government's business interests, the S & D official will suspend or debar the contractor. A suspension is for a temporary period, pending the completion of legal proceedings (including appeals) or the government's investigation of the allegations. FAR 9.407-4(a). The suspension may not exceed one year, unless (i) the contractor has been indicted, or (ii) the Department of Justice requests an extension for an additional 6 month period so as to enable the completion of the investigation. FAR 9.407-4(b). A debarment is for a definite period, "generally" not to exceed 3 years. FAR 9.406-4(a). The Air Force has debarred contractors for much shorter periods than 3 years, based upon a showing of mitigating circumstances and for periods in excess of 10 years based upon findings of egregious or repeated misconduct.

Present Responsibility Determination

Contractor's focus on present responsibility Rather than contest the facts alleged in the notice of suspension or proposed debarment, many contractors choose to focus their submissions on their present responsibility. Such an approach, based upon changed circumstances, can be effective, particularly where several years have elapsed between the date of the actionable misconduct and the initiation of the suspension/debarment action. This is so because, as previously discussed, the issue in a suspension/debarment action is not whether the alleged misconduct actually occurred but, rather, whether based upon that misconduct, and other factors, the contractor is or is not *presently* responsible. FAR 9.402(a); *See Caiola v. Carroll*, 851 F.2d 395, 398-99 (D.C. Cir. 1988); *See* THE PRACTITIONER'S GUIDE TO SUSPENSION AND DEBARMENT 56 n.222 (Richard J. Bednar, *et al.* eds., 3rd ed. 2002). It is the contractor's burden to demonstrate present responsibility.

Misconduct is threshold issue A contractor faced with an allegation of actionable misconduct must clearly and unequivocally admit or deny the occurrence of that misconduct. If the contractor believes that it did not commit the misconduct, then the contractor is entitled to a determination of the facts, and if the contractor is correct, then the Air Force will terminate the suspension or debarment action. However, in the case of misconduct, the misconduct and how the contractor subsequently dealt with it are material to the present responsibility determination. SAF/GCR does not entertain

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[4] If a contractor raises a genuine dispute as to some, but not all of the material facts, the debarment decision typically will be based only upon the facts that were uncontested.

[5] A fact-finding proceeding will not be held to determine factual disputes in a fact-based suspension if a determination is made "on the basis of Department of Justice advice" that "substantial" government interests in "pending or contemplated legal proceedings" would be prejudiced by such a proceeding. FAR 9.407-3(b)(2).

present responsibility arguments until the threshold issue of the alleged misconduct is resolved.

Full disclosure required SAF/GCR will insist on a full and complete disclosure of the circumstances underlying the misconduct, including in most cases copies of reports of internal investigations and the identification of all persons involved in the wrongdoing. The report of internal investigation should be the one drafted for management, regardless of privilege. A sanitized copy prepared for the government will be less persuasive. While privileged information cannot be compelled, it certainly can be provided voluntarily. Responsible contractors typically provide such information upon request.

Contractor's presentation If the contractor admits the alleged misconduct, or if it has been otherwise established, the contractor may present evidence demonstrating it acted responsibly in dealing with the violation and took other action to insure such violations would not reoccur. The S & D official may decline to debar a contractor even where the misconduct is clear upon consideration of, among other things, the several mitigating factors set forth in FAR 9.406-1(a).

Important factors The FAR's mitigating factors, FAR 9.406-1(a), are examples of circumstances that credit the contractor for efforts to prevent misconduct, for responding in a positive manner after learning of the misconduct, and for open, transparent dealing with the government. The most significant question is whether senior management genuinely recognizes the seriousness of the misconduct. Other factors include:

(i) whether an internal investigation was conducted to determine the scope of the misconduct and whether the report was provided to the government;

(ii) whether appropriate discipline was taken against the offending persons;

(iii) whether remedial measures were taken to avoid future misconduct; and

(iv) whether a standards of conduct program existed at the time of the misconduct.

An effective business standards program must involve all aspects of the contractor's business including its procurement department. For example, in weighing competitive bids does the contractor have a program that rewards a potential supplier for having an ethics program? If the contractor is unconcerned with the ethics of its suppliers, the sincerity with which it claims to be concerned about its own ethics must be questioned.

Full cooperation The responsible contractor will have taken not only the appropriate steps internally after learning of the misconduct, but will have fully cooperated with the government in resolving the contractor's liability. Several FAR

mitigating factors are illustrative. Did management bring the misconduct to the attention of the government? Have the results of the internal investigation been provided to the government? If warranted by the evidence, has the contractor accepted responsibility by pleading guilty? Has the contractor paid all fines and penalties? Positive answers to these questions are merely indicia of present responsibility. Their presence or absence is not determinative. FAR 9.406-1(a).

S & D official's discretion If the S & D official determines that actionable misconduct did occur and the contractor failed to meet its burden of demonstrating its present responsibility, the contractor likely will be debarred or suspended. If, on the other hand, the contractor proves it is presently responsible, then the S & D official can decide debarment is not necessary to protect the government's interests, and either terminate the action or require the contractor to enter into an administrative agreement, in lieu of debarment. DFARS 209.406-1(a)(i).

Administrative Agreements

Administrative agreements, signed by the Air Force and the contractor, generally last for three years, identify the misconduct that formed the basis for the action, incorporate the remedial measures taken by the contractor which led to the present responsibility conclusion, and require audits and periodic reporting to verify compliance.

Typical agreement The typical agreement contains a provision requiring the contractor to engage an outside consultant (approved in advance by the Air Force) to perform two reviews of the contractor's business standards program—one near the beginning and the other near the end of the period of the agreement. The results of the reviews are required to be provided by the consultant directly to the Air Force. The contractor is also required to provide the Air Force with copies of all internal audit reports that relate to the contractor's ethics program or compliance with the administrative agreement.

Reporting requirement Finally, the contractor is required to submit periodic reports to the Air Force in which extensive information is provided about the operation of the contractor's business, including details about its newly implemented, or revised business standards program. Such reports include, among many other things, summaries of calls to the contractor's "Hotline," and the measures taken by management in response to such calls, descriptions of all ethics and compliance training conducted in compliance with the agreement, and a number of required certifications by the contractor's Board of Directors. The contractor is also required to report all known fraud related litigation and investigations, as well as all known "misconduct," regardless of whether it is the subject of litigation or investigation. The contractor acknowledges in the agreement that any violation of the agreement evidences lack of responsibility, and may form a separate basis for debarment.

COORDINATION OF REMEDIES

General approach Any discussion of suspension and debarment as an affirmative administrative remedy invites the question of what impact, if any, such actions could have upon the Air Force's other remedies. All remedies of significant fraud cases are closely monitored and coordinated by the Acquisition Fraud Counsel and by SAF/GCR, which overseas the Air Force's fraud remedies program. It is the policy of the Fraud Remedies Program to coordinate all administrative, criminal, civil and contractual remedies of such cases *simultaneously*, as appropriate.

There is no formula by which one remedy should precede the others. As a general rule, Acquisition Fraud Counsel should consider suspension and debarment from the outset of a fraud case and should develop a file that will support such remedies. In many cases, an early suspension or proposed debarment will encourage resolution of the criminal or civil case. Therefore, whenever justified by the evidence, it is the Air Force's policy to pursue suspension and debarment as early as possible—provided that doing so will not be detrimental to ongoing litigation or investigations.

It is not the policy of the Air Force (or of the Department of Justice) to propose global settlements of criminal, civil and administrative remedies. In criminal or civil litigation, if a defendant wants to discuss debarment, the Acquisition Fraud Counsel should refer the defendant to SAF/GCR. Debarment is not a bargaining chip in criminal or civil litigation, and debarment should not be mentioned in plea agreements or civil settlement agreements.

Department of Justice's policy The Department of Justice, as a matter of policy, also encourages simultaneous criminal, civil and administrative proceedings, and recognizes how each can benefit from the other. *See* Memorandum of the Attorney General, Coordination of Parallel Criminal, Civil, and Administrative Proceedings (July 28, 1997). In most cases, early suspension and debarment consideration enhances, rather than inhibits, parallel criminal and civil proceedings. Furthering criminal and civil cases is, of course, not the purpose of suspension and debarment, which are imposed only to protect the government's business interests, and not for the purpose of punishment. FAR 9.402(b). The natural collateral consequences of such actions need not be ignored, however.

Coordination While it is almost always in the Air Force's interest to pursue its civil, criminal and administrative remedies concurrently, we coordinate potential debarment actions closely with the Department of Justice to avoid interference in the unusual case. We would not want to prematurely disclose the government's interest where the Department of Justice is directing an undercover or electronic surveillance operation, for example. Similarly, the Department of Justice is sensitive to the debarment remedy. It refuses, as a matter of policy, to include in civil and criminal settlement agreements, any provision purporting to resolve the contractor's debarment liability. Thus, early debarment referrals both protect the government's business interests, and assist it in obtaining civil and criminal remedies.

DISCOVERY IN CIVIL LITIGATION

I. Introduction

Discovery is an important part of procurement civil fraud litigation, and evidence disclosed during discovery often leads to settlement and always has a significant impact on the outcome of a lawsuit. Discovery is often time-consuming and expensive and frequently results in hotly contested motions to compel discovery or for protective orders. In federal court, there are two types of "discovery" in civil litigation: (i) "required disclosures" and (ii) traditional formal discovery. Lawyers generally refer to both types as "discovery," but the Federal Rules of Civil Procedure treat only the latter as discovery.

Absent agreement of the parties or a specific order of the court, required disclosures and formal discovery are governed Rules 26 - 37 of the Federal Rules of Civil Procedure and by the local rules of the court. The conduct of discovery is heavily influenced by local practice, and it is always necessary to consult the court's local rules. The local rules of most U.S. district courts are available online and can be accessed via http://www.uscourts.gov/links.html.

In procurement fraud litigation, the Acquisition Fraud Counsel ("AFC") has an essential role assisting the Department of Justice in conducting discovery and responding to discovery requests.

II. Mandatory Disclosures

Rule 26(a) provides for three categories of required disclosures: (i) initial disclosures; (ii) disclosures of expert testimony; and (iii) pretrial disclosures.

► *Initial disclosures*

There are four categories of information that a party must provide without awaiting a discovery request. Rule 26(a)(1).

(A) The name, address and telephone number of each person likely to have discoverable information that the disclosing party may use to support its claims or defenses;

(B) A copy of, or description by category and location, of all documents, data and tangible things that are in the control of the party and which the party may use to support his claims or defenses;

(C) A computation of damages claimed by the disclosing party and the documents on which the computation is based;

(D) A copy of any insurance agreement that may satisfy a judgment.

Rule 26(f) requires the parties to confer as soon as practicable to develop a discovery plan and to discuss initial disclosures. The rule requires that the initial disclosures be made within 14 days after the conference, unless the parties stipulate to a different date, which they often do. In practice the initial disclosures typically occur four to six weeks after the defendant has answered.

What is important to keep in mind is that these initial disclosures occur relatively early in the litigation, and for that reason it is important that the Air Force have the required information available at an early date after the United States has filed a complaint alleging procurement fraud or after the court has unsealed a *qui tam* complaint. In particular, the AFC must be prepared to provide the DOJ with the names and contact information of all Air Force personnel who may have discoverable information and copies of all Air Force documents and data that the government may want to use to support claims or defenses. Further, the AFC should take the lead in coordinating the computation of damages with the contracting officer and, where applicable, with auditors.

A party must make the initial disclosures based on the information reasonably available to the party and is not excused from making initial disclosures because it has not fully completed its investigation. As with all disclosures and responses to discovery, a party is obligated to supplement its disclosures if the party learns that its initial disclosures are incomplete or incorrect in some material respect.

► ***Disclosure of expert testimony***

A party must disclose the identity of any expert who may be used at trail to present evidence under Rules 702, 703 and 705 of the Federal Rules of Evidence. The disclosure must be accompanied by a report signed by the witness. Rule 26(a)(2)(A). The report must address at least the following:

- a complete statement of all opinions and the basis and reasons therefore;
- the data or other information considered by the witness in forming the opinions;
- any exhibits to be used as a summary of or support for the opinions;
- the witness' qualifications including a list of all publications authored by the witness within the preceding 10 years;
- the compensation to be paid the witness; and
- a list of other cases in which the witness has testified as an expert within the preceding four years.

Rule 26(a)(2)(B). Unless otherwise ordered or agreed to, expert disclosures must be made at least 90 days before the trial. Rule 26(a)(2)(C).

► ***Pretrial disclosures***

A party must disclose three categories of information: (i) the names and contact information of witnesses who may be called at the trial; (ii) the designation of deposition testimony that may be used at trial; and (iii) a list of exhibits that may be used at trial. Unless otherwise ordered or agreed to, these pretrial disclosures must be made at least 30 days before trial.

III. Discovery—General Considerations

As mentioned above, Rule 26(f) requires the parties to confer to discuss the timing of initial disclosures and to develop a discovery plan. Rule 26(d) provides that absent a court order or agreement of the parties, a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f). This means that usually formal discovery does not begin until after the parties have completed initial disclosures.

► ***Scope of discovery***

Rule 26(b) governs the "scope and limits" of discovery. The rule provides in part that, "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Generally speaking relevance for discovery purposes is broadly construed. Under Rule 26(b), "information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Food Lion, Inc. v. United Food and Commercial Workers International Union*, 103 F.3d 1007, 1012 (D.C. Cir. 1997). Trial courts exercise considerable discretion in handling discovery matters, and a district court's decision to permit or deny discovery, and an appellate court will reverse a district court's discovery ruling only for an abuse of discretion. *Brune v. Internal Revenue Service*, 861 F.2d 1284, 1288 (D.C. Cir. 1988).

► ***Limits on discovery***

Although discovery in federal civil litigation casts a wide net, nevertheless there are reasonable limits on what may be discovered. *See, e.g., Epstein v. MCA, Inc.*, 54 F.3d 1422, 1423 (9th Cir. 1995) (rejecting discovery having no bearing on the merits of the case); *In re Fontaine*, 402 F. Supp. 1219, 1221 (E.D. N.Y. 1975) ("While the standard of relevancy [in discovery] is a liberal one, it is not so liberal as to allow a party to roam in shadow zones of relevancy and to explore matter which does not appear germane on the theory that it might conceivably become so.").

IV. Written Discovery

A. Interrogatories

Fed. R. Civ. Proc. 33 provides that a party may serve upon any other party written interrogatories, not exceeding 25 in number including all discrete subparts. The parties can agree to a larger number of interrogatories. Each interrogatory must be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for the objection and shall answer to the extent the interrogatory is not objectionable. Under the local rules of most district courts, the text of the interrogatory must be stated followed by the answer.

► ***The party, not the attorney, must sign answers.***

Answers must be signed by the person making them. This means that the party, not the attorney, must sign the answers. The person signing the answers to interrogatories is a likely target of a deposition notice. **Therefore, an Air Force lawyer should not sign answers to interrogatories.** Answers to interrogatories should be signed by Air Force personnel having personal knowledge of the facts set forth in the answers.

In some cases, because of the breadth of topics covered by interrogatories, it is necessary for more than one person to sign answers to interrogatories. Alternatively, if no one person has personal knowledge of the facts stated in response to an interrogatory, it may be necessary for the person signing to state that the answer is gleaned from information provided by identified other persons with personal knowledge.

► ***Option to produce business records***

A party has the option of producing business records in response to an interrogatory. If the answer to an interrogatory can be derived or ascertained from business records, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer the interrogatory by specifying the records from which the answer can be derived and affording the party serving the interrogatory reasonable opportunity to inspect and copy the records. Fed. R. Civ. Proc. 33(d). In the appropriate circumstance, using the option to produce business records can be a convenient way to answer an otherwise burdensome interrogatory.

B. Requests for documents and things and entry upon land

► ***In general***

Fed. R. Civ. Proc. 34 permits the inspection and copying of documents and tangible things, such as machinery and equipment, and it permits a party access to land for the purpose of inspecting, measuring, testing and sampling. Discovery requests

under Rule 34 are used in almost every civil case. The term 'documents" is broadly defined to include writings, drawings, graphs, charts, photographs, and data compilations. It obviously includes records stored in electronic form. A Rule 34 request can be directed only to a party, and a person not a party can be compelled to produce documents and things only as provided for in Fed. R. Civ. Proc. 45, which governs the issuance and use of subpoenas.

Unless otherwise agreed to or ordered by the court, a party has 30 days within which to respond to a Rule 34 request. A party producing documents in response to a Rule 34 request "shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request."

► ***The AFC's role***

At the start of litigation, the AFC should advise the contracting office and the program office to retain documents, including electronic records that are relevant to the litigation.

The AFC is responsible for assembling Air Force documents that are responsive to a Rule 34 discovery request. If the Air Force receives a request for documents, the AFC should determine which offices and entities within the Air Force are likely to have documents that are responsive to the request. The AFC should communicate with each such office or entity, explain the document request, and direct the office or entity to identify documents that are responsive to the request. The AFC should keep a record of the locations and custodians of all responsive records. The AFC should then discuss with the AUSA the best way to produce the records. If there are a large number of records, opposing counsel may be invited to inspect the records on site and mark them for copying. The party requesting discovery of the documents must pay for the copying; the Air Force does not pay copying costs. Often, the requesting party arranges for copying by a private copying service and pays the copying service.

If the documents are in electronic form, then it is usually easiest and cheapest to produce the documents in electronic form. Of course, it is essential to keep an accurate record of exactly what is produced. Sometimes, it is necessary to write a special program to extract certain data from larger volume of electronically stored records. Document production must be coordinated with the AUSA and the investigating agents.

► ***Privileged documents***

Litigants often refuse to produce documents on the grounds that they contain privileged information. This is a valid objection. However, if a party withholds information by claiming that it is privileged or subject to protection as trial preparation material, then the party must make the claim expressly and must describe the nature of the documents in a manner that, without revealing the privileged information, will enable other parties to assess the applicability of the privilege or protection. In practice, this means that a party asserting privileges as to documents must prepare and serve a

privilege log identifying (i) the type of document, (ii) the date of the document, (iii) the author, (iv) the addresses, and (v) the general subject of the document.

Because the Acquisition Fraud Counsel will often have a better understanding than the lawyers at the Department of Justice of what documents are privileged, the Acquisition Fraud Counsel should be involved with the preparation of the privilege log.

C. Requests for admissions

Fed. R. Civ. Proc. 36 provides that a party may request the opposing party to admit that certain facts are true and that designated documents are genuine. The requests can be as broad as the scope of discovery permitted by Fed. R. Civ. Proc. 26(b)(1) and may concern statements or opinions of fact or the application of law to fact. For example, a party can request the opposing to party to admit that a designated document is a contract. Requests for admission must be admitted or denied or objected to within 30 days; otherwise they are admitted.
A denial must fairly meet the substance of the requested admission.

An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that it has made a reasonable inquiry and that the information known or readily obtainable by a party is insufficient to enable the party to admit or deny.

It is important to keep in mind that any matter admitted under Rule 36 is conclusively established for the purposes of the litigation. Therefore, it is extremely important that the Acquisition Fraud Counsel and other Air Force personnel, such as contracting officers and program officers, assist the Department of Justice in preparing responses to requests for admissions.

V. Depositions

A. General principles

In the federal courts, depositions are governed by Fed. R. Civ. Proc. 30 and 32. These rules broadly permit taking depositions for the purposes of discovery or evidence or both. The deponent is examined and cross-examined as permitted at trial under the Federal Rules of Evidence, except that objections are noted for the record and the examination proceeds. The only exception is if the question calls for the disclosure of privileged information, then counsel will instruct the witness not to answer.

Under Fed. R. Civ. Proc 32(d)(3)(A), objections to the relevancy or materiality of evidence are not waived by failure to object during the depositions. Usually, the parties agree that hearsay objections are preserved and need not be made during the deposition. However, objections to the form of the question or to any matter the might be obviated, removed or cured if promptly raised are waived unless objected to at the

deposition. Thus, if a question is ambiguous or calls for an opinion or speculation, then the deponent's lawyer must object or else the objection is waived.

B. Preparing the witness for a deposition

1. Standard advice when preparing a witness to testify

It is unlikely that an Acquisition Fraud Counsel will be asked to take or defend a deposition. However, it is possible that the Acquisition Fraud Counsel will be asked to prepare, or assist in preparing, as witness for a deposition. There is certain standard advice that should be given when preparing a witness to testify.

► Instruct the witness to tell the truth. This is important not only because the witness should tell the truth, but also because opposing counsel may ask the witness what he or she did to prepare for the deposition and whether counsel gave him/her any instructions on how to answer questions. It is good for the witness to testify that counsel told the witness to tell the truth.

► Instruct the witness to listen carefully to the question and not answer the question if the witness is unsure of its meaning. The witness should listen carefully for ambiguities in the question and not answer until the ambiguity has been clarified. For example, witnesses are often asked if they reviewed documents. The word "review" has multiple meanings. It can mean that the witness perused the documents, read them, or studied them in depth. The witness should either ask the questioner what meaning is intended or should specify a meaning in his answer. A related point is that a witness should never answer if the question incorporates a technical term that the witness does not understand. This is an important point, because many people are reluctant to admit that they do not understand something.

► Instruct the witness to answer only the question that is asked and no other question. It may be a standard tactic of politicians to answer the question they would like to have been asked rather the question that they were asked, but this is not a good tactic at a deposition.

► Instruct the witness not to volunteer information. If the question does not ask for the information, then do not volunteer the information. It is not unfair to make the questioner ask the right questions. The witness is under no obligation to help out. Volunteering information expands the scope of the deposition opening up areas of inquiry that the questioner may overlook. Volunteering information is a good way for a witness to get into trouble.

► Instruct the witness never to guess. If the witness does not know the answer, then the response is that the witness does not know. If the witness is not sure of the answer, or does not recall the answer, then the proper response is that the witness is not sure or does not recall. As mentioned above, people often are

embarrassed if they do not know the answer, and it is important to remind that witness that guessing and speculating will cause a lot worse embarrassment.

► Instruct the witness to give as short an answer as possible that is nonetheless still responsive to the question.

► Instruct the witness to pause before answering so as to give counsel a chance to object if counsel chooses to do so.

► Finished the preparation session by again reminding the witness to tell the truth.

2. A warning about privileged information

When preparing a witness to testify at a deposition, you should show the witness only documents that can be disclosed to opposing counsel. If you want to maintain the privileged status of a document, then never show it to the witness during preparation for the deposition. Fed. R. Evid. 612(2) provides that if, before testifying, a witness uses a document to refresh his memory for the purpose of testifying, then the court can order the document disclosed to opposing counsel. Therefore, be careful what documents you show to the witness during preparation of the deposition. As an example, never give the witness a list of questions that may be asked at the deposition, because the list may be discoverable.

QUI TAM LITIGATION

Background and History

Since its original enactment in 1863, the False Claims Act ("FCA") has allowed a private citizen to sue under the Act, "as well for himself as for the United States."[6] In a *qui tam* action, a private individual is permitted to sue in the government's name and to share in the recovery. Such an individual is known as a "relator." *See United States ex rel. Totten v. Bombardier Corp.*, 286 F.3d 541, 545-46 (D.C. Cir. 2002). In addition to encouraging honest employees to report fraud, another purpose of the *qui tam* provisions of the FCA is to "set a rogue to catch a rogue." The *qui tam* provisions are intended to encourage all persons with information about fraud against the government to come forward.

There were few reported cases under the *qui tam* provisions until the late 1930's, when several plaintiffs filed what the then Attorney General referred to as "mere parasitical actions" by copying criminal indictments in the hope of recovering a windfall bounty. The Supreme Court upheld the practice in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), although Justice Jackson sharply criticized the resulting enrichment of a "mere busybody who copies a Government's indictment as his own." *Id.* at 558.

In response to *Marcus*, Congress in 1943 amended the FCA to provide that a private person could bring a *qui tam* action only if the action were based on information not known to the government at the time the suit was filed. Under the 1943 amendment, in order to qualify for an award, the relator had to provide new information to the government through the lawsuit. If the action was based on information previously known to the government, then the relator did not qualify as a proper relator and was not entitled to any award, even if the government took no action to remedy the alleged fraud. This jurisdictional bar applied even if the government's pre-suit knowledge were provided by the same person who later instituted the *qui tam* suit.

Current *Qui Tam* Provisions

A. Overview

One purpose of the 1986 FCA amendments to 31 U.S.C. § 3730 was to encourage private reporting of fraud against the government by increasing the financial incentives for those who sue. To that end, the amendments extensively revised and liberalized the provisions governing *qui tam* suits. Among the revisions were changes in the procedures for initiating *qui tam* actions; a significant reduction in the jurisdictional bar, created by the 1943 amendments, against *qui tam* suits based on information known to the government; an increased share in the recovery for the relator;

[6] From the Latin "*Qui tam pro domino rege quam pro se ipso in hac parte sequitur*"--"Who as well for the King as for himself sues in this matter." The proper Latin pronunciation is "kwee" as in queen, "tom" as in the name, Tom.

"whistleblower" protection; and increased rights of the relator to participate in the litigation. Taken as a whole, the 1986 amendments made it easier and more attractive for *qui tam* plaintiffs to sue.

B. Actions by private persons

> *A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.*
> 31 U.S.C. § 3730(b)(1).

1. Who may bring an action and how it may be dismissed

► *Who is a "person"*

The FCA states simply that a "person" may bring a civil false claims action. "Persons" include individuals, partnerships, corporations, and states.

► *Action in the name of the United States*

Qui tam actions are usually styled "United States ex rel. [Relator] v. [Defendant]."

► *Dismissal (settlement) by relator*

Section 3730(b)(1) states that *qui tam* actions may be dismissed "only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting." Some courts have held that the consent provision applies only to voluntary dismissals and not where the court orders dismissal on substantive grounds. Other courts have held that the Attorney General's consent is not necessary, even for voluntary dismissals, when the government has declined to intervene.

2. Filing suit and the seal requirement

> *A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.*
> 31 U.S.C. § 3730(b)(2).

► ***Filing the complaint in camera***

To initiate a *qui tam* lawsuit, the relator must file a complaint *in camera* and under seal with the court. The defendant is not served with the complaint at the time of filing. The purpose of the sealing requirement is to allow the government adequate opportunity to evaluate the lawsuit and to determine both if the suit involves matters that the government is already investigating and whether it is in the government's interest to intervene and take over the civil action. In addition, the seal is intended to guard against premature disclosures of criminal investigations. Partial lifting of the seal to accommodate the government's investigation is common.

► ***Relator's written disclosure***

The relator must serve on the government a written disclosure of substantially all material evidence and information the relator possesses. If the relator fails to serve a written disclosures statement on the government, then the action is subject to dismissal.

► ***The time the complaint remains under seal***

The FCA provides that the complaint is to remain under seal for at least 60 days and shall not be served on the defendant until the court so orders. The FCA also states that the government has 60 days from receipt of both the complaint and the written statement of material evidence within which it may elect to intervene. *Qui tam* cases often are filed while a criminal investigation or prosecution of the same allegations or defendants is pending. In many instances, the government will move to extend both the sealing period and its time for intervention until after the criminal proceedings have concluded.

3. Government's investigation

Once a *qui tam* suit has been filed, the government's lawyers and investigators must quickly gather as much information as possible. If the Department of Justice (DOJ) is interested in pursuing a criminal prosecution, then it is essential to coordinate the civil and criminal aspects of the investigation. Because civil attorneys are precluded access to grand jury materials, feasible alternative methods of gathering evidence for a joint criminal/civil investigation should be used—*i.e.* inspector general subpoenas, search warrants, and civil investigative demands.

The Department of the Air Force assigns an Acquisition Fraud Counsel (AFC) and an investigator to work with the lawyer from the DOJ. The AFC should be an active part of the team supporting the investigation. In most cases, DOJ's first investigative step is to interview the relator. The next step usually is meeting with agency counsel—*i.e.*, the AFC—and contracting personnel to learn about the contract and program involved in the lawsuit and to locate relevant documents. **All government personnel involved in the investigation should be reminded that the matter is under seal and that they must keep the existence of the *qui tam* suit secret, especially from the**

defendant. The AFC should actively assist the investigation and stay in contact with the AFOSI and DCIS agents and the DOJ lawyers.

4. Intervention and non-intervention

> *Before the expiration of the 60-day period or any extensions . . . the Government shall –*
>
> > *(A) proceed with the action, in which case the action shall be conducted by the Government; or*
> >
> > *(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.*
>
> *31 U.S.C. § 3730(b)(4).*

It is DOJ's policy to intervene in all significant meritorious *qui tam* actions, to decline intervention in cases that lack merit, and to file a suggestion of dismissal when the action is defective for lack of jurisdiction. Typically, if DOJ intervenes, then DOJ files an amended complaint pleading the causes of action in the manner that DOJ believes is suitable. If DOJ believes that the case lacks merit, then DOJ will decline to intervene, and the relator may prosecute the action independently. In some cases, DOJ initially may decline to intervene, but later reconsider and move to intervene in the lawsuit.

► *Consultation with Air Force*

DOJ always asks the Air Force for its recommendation on intervention and non-intervention, and it is extremely important to state the Air Force's position on this important issue. Under Air Force Instruction 51-1101, SAF/GCR is the central authority for receiving, coordinating, and responding to inquiries from DOJ in all *qui tam* actions involving the Air Force. *See* AFI 51-1101, Chap. 2. SAF/GCR provides to DOJ all recommendations concerning intervention, settlement, or dismissal of *qui tam* actions. The AFC is responsible for providing SAF/GCR with timely recommendations on intervention, settlement or dismissal. Such recommendations must include a detailed assessment of whether the relator's allegations have merit and a quantification of any damages incurred by the government. Such recommendations should include input from the investigating agent, the affected program office, the contracting officer, and, where appropriate, the Defense Contract Audit Agency.

C. Rights of the parties in *qui tam* actions

1. When the United States intervenes

If the United States intervenes in the lawsuit, then it has the primary responsibility for litigating the case. The United States is not bound by any previous act of the relator.

31 U.S.C. § 3730(c)(1). The United States usually files an amended complaint that may expand on or eliminate some of the relator's allegations or limit or add defendants. After the government intervenes, the relator continues as a party to the litigation, but the court may impose limitations on the relator's participation in the litigation. After the government intervenes, many relators voluntarily limit their participation and await a favorable result.

At any time after the government takes over the lawsuit, it can move to dismiss it. The action may be dismissed, even over the relator's objection, provided that the government notifies the relator of the motion and the court gives the relator an opportunity to be heard. Dismissal is appropriate when an action suffers from a jurisdictional or other legal defect. It is not the practice of DOJ to seek dismissal of a relator's claim merely because DOJ believes that the claim lacks merit.

► *Settlement, recovery, fees, cost and expenses*

The government may settle the action with the defendant notwithstanding the objections of the relator if the court determines after a hearing that the proposed settlement is fair, adequate, and reasonable under all the circumstances. 31 U.S.C. § 3730(c)(2)(B).

There are two unique issues in settling *qui tam* actions: the relator's share, and the award of fees, expenses, and costs to the relator. The relator's share is a matter for negotiation between the government and the relator. If the government has intervened, the relator receives at least 15 percent, but not more than 25 percent, of the recovery. 31 U.S.C. § 3730(d)(1). However, these percentages are subject to the following exception. If the court determines that the action was based primarily on information *other than information provide by the relator*, then the court may award not more than 10 percent of the recovery to the relator.

As for the relator's fees, expenses and costs, the statute provides that those are awarded directly against the defendant. 31 U.S.C. § 3730(d)(1). Consequently, the relator's fees, costs and expenses are normally a subject of negotiation between the defendant and the relator, not between the defendant and the government. However, defendants often try to settle for a bottom line number that includes the damages and penalties, plus all fees, costs and expenses.

2. When the United States declines to intervene

If the government declines to intervene at the outset, then the relator is the sole plaintiff in the action. 31 U.S.C. § 3730(c)(3). The government is not a formal party to the action, but nevertheless remains a real party in interest. The government continues to have an interest in the action after declination. Because the action concerns government claims and contracts, and the government is the ultimate beneficiary of any recovery, it has an interest in any settlement. Therefore, even if the government

declines to intervene, the action may not be settled or dismissed without the consent of the Attorney General. 31 U.S.C. § 3730(b)(1).

After initial declination, the United States may decide that it should intervene in the lawsuit, and it can do so upon a showing of "good cause." 31 U.S.C. § 3730(c)(3).

► ***Award to relator***

If the government declines to intervene, and the relator achieves a settlement or judgment, then the relator is awarded not less 25 percent nor more than 30 percent of the recovery, plus reasonable attorney's fees, costs and expenses, which are awarded against the defendant.

► ***Discovery from government after declination***

Because the government is not a party to the action when it declines intervention, discovery from the government must be obtained as it would from any third party to the litigation. The use of interrogatories, requests for documents, requests for admissions, and notices of deposition are inappropriate. A subpoena under Rule 45 of the Federal Rules of Civil procedure is required.

It is the Air Force's policy that private *qui tam* litigants will have reasonable and impartial access to information during discovery in cases involving the Air Force in which the government declined to intervene, unless the information is classified, privileged, or otherwise protected from public disclosure. *See* AFI 51-1101, Chap. 3. A private *qui tam* litigant requesting the release of official information or testimony from Air Force personnel must set forth in writing the specific nature and relevance of the information or testimony sought.

Any Air Force organization that receives such a request shall forward the request to SAF/GCR for approval and forward an information copy of the request to the concerned Major Command. After consultation with DOJ, AFOSI, and the concerned installation AFC, SAF/GCR determines whether the information should be disclosed or whether Air Force personnel may appear and testify as witnesses or be interviewed. In determining whether to approve such requests, SAF/GCR considers, *inter alia*, whether:

(i) the request is unduly burdensome;

(ii) the disclosure or testimony would violate a statute, executive order, or regulation;

(iii) the disclosure would breach a privilege;

(iv) whether the disclosure would be an unauthorized release of classified information; and

(v) the disclosure would interfere with an ongoing investigation or reveal trade secrets or similar confidential commercial or financial

information.

Under AFI 51-1101, Air Force personnel should only produce, disclose, comment on, or testify concerning those matters approved by SAF/GCR in writing.

Jurisdictional Bar

> *(e)(4)(A) No court shall jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.*
>
> *(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.*
> *31 U.S. C. § 3730(e)(4).*

Section 3730(e)(4) bars suits brought on "the public disclosure of allegations or transactions," unless the person bringing the action is an "original source" of the "information" and has provided voluntarily the information to the government before suing. *See, e.g., United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 651 (D.C. Cir. 1994). The history of the *qui tam* provisions demonstrates congressional efforts to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior. The public disclosure bar must be analyzed in the context of these twin goals of rejecting suits which the government is capable of pursuing itself, while promoting those which the government is not equipped to bring on its own.

The statute sets up a two-part test for determining jurisdiction. First, the court must ascertain whether the "allegations or transactions" upon which the suit is based were "publicly disclosed" in a "criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media." If—and only if—the answer to the first question is affirmative will the court then proceed to the "original source" inquiry, under which it asks whether the *qui tam* plaintiff "has direct and independent knowledge of the information on which the allegations are based." *Id.* at 651.

▶ *"Public Disclosure"*

The first question is what is a "public disclosure." It is important to note that the jurisdictional bar is triggered by the public disclosure of "allegations or transactions," not by the disclosure of "information." For example, disclosing random information lacking a coherent pattern might not be a disclosure of allegations or transactions.

The FCA has a list of the types of disclosures that will trigger the jurisdictional bar, and some courts have construed the list as exclusive and not as mere examples of the types of public disclosures that might act to bar a *qui tam* action. Other courts have interpreted the list more broadly to include all actual disclosures in public forums, and some have gone farther and held that potential public availability of information is enough to trigger the bar. Arguably, the FCA's list covers the universe of possible public disclosures by addressing each of the possible sources of public disclosure.

The **first source** covers disclosures in judicial and administrative forums—criminal, civil and administrative hearings. The word "hearing" is roughly synonymous with "proceeding." It means more than just court proceedings in open court and includes papers filed in a judicial or administrative proceeding. "The word 'hearing' no longer means receiving sound through the ears. One may now 'hear' the written words on a piece of paper." *Id.* at 652.

The **second source** covers disclosures occurring in executive and legislative investigations and other administrative proceedings, including hearings, investigations and audits.

The **third source** is the new media.

If the information made public is general, nonspecific, and unlikely to lead to the discovery of fraud cognizable under the FCA, then the disclosure is not sufficient to be deemed a public disclosure under § 3730(e)(4). In such a case, there is no public disclosure bar.

If there has been a public disclosure of information, then the quantity and quality of the information that a relator must provide, in addition to the publicly disclosed information, in order to withstand dismissal under the public disclosure bar has been the subject of debate. In *Quinn*, 14 F.3d at 655, the court ruled that the disclosure of pay vouchers and telephone records during discovery were not sufficient, by themselves, to constitute the disclosure of allegations and transactions that would bar a relator from proceeding with the lawsuit. The court also said that if the "essential elements" of a fraud were already public, then the *qui tam* case would be barred even if the relator added new nonpublic information. On the other hand, if all essential elements had not been publicly disclosed–that is, if both facts *X* and *Y* are needed to state a claim, and only *X* has been disclosed–then the relator can proceed with his lawsuit if he produces *Y*, even though *Y* alone would not be sufficient to state a claim.

► ***"Based Upon"***

The next issue is whether the relator's action is based on allegations or transactions that have been publicly disclosed. If the relator's lawsuit is not based on publicly disclosed allegations or transactions, then it is not barred by the public disclosure bar, and there is no need to determine if the relator is an "original source" under § 3730(e)(4)(B). There is some dispute as to whether "based upon" means entirely based on or whether it means "based in any part upon" or "supported by." Some courts hold that if the allegations in the relator's complaint or disclosure statement are based in any part on the allegations or transactions that have been publicly disclosed, then the action is barred, unless the relator can demonstrate that he or she is an "original source."

► ***"Original Source"***

A pubic disclosure bars suit unless the relator qualifies as an "original source," because Congress never intended a *qui tam* plaintiff to benefit in whole or in part on publicly disclosed allegations. An "original source" must have "direct and independent" knowledge of the information that is the basis of his or her action, and must have voluntarily provided that information to the government before suing. The requirement is conjunctive; the *qui tam* plaintiff must have direct and independent knowledge. *Quinn*, 14 F.3d at 656. Some courts have added another requirement—that the relator must be a source to the entity making the disclosure. *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 15-16 (2d Cir. 1990).

► ***"Direct and Independent"***

The terms "direct" and "independent" are used in the conjunctive in the FCA, and the relator must satisfy both requirements.

Direct: Direct means marked by absence of an intervening agency. *Quinn*, 14 F.3d at 656. To be "direct," the relator's knowledge must be that of an insider not a disinterested outsider. *FMC Corp.*, 975 F.2d 1412. The relator's knowledge of the fraud must have been gained by virtue of a direct relationship to, or interest in, the claims. To be "direct" the information must have been acquired in the "absence of an intervening agency, instrumentality or influence," rather than through an intermediary. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149. 1160 (3rd Cir. 1991). A government employee whose job it is to review information presented by others is a recipient of information, not its source. For example, in *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740 (9th Cir. 1995), the relator was a former employee of the Office of the Inspector General at the U.S. Department of Energy. The court acknowledged that Fine provided the information underlying his claims to the government prior to suing, but he did so as part of his job responsibilities. His provision of the information to his employer—the government—was

not voluntary within the meaning of the FCA, and therefore he was not an original source.

Independent: The relator's knowledge must be independent of the public disclosure. "[W]here one would not have learned of the information but for its public disclosure, one does not have 'direct and independent knowledge' of the information." *FMC Corp.*, 975 F.2d at 1417. The FCA is designed to reward persons who have independent information about fraud and who have a hand in bringing that information to light, not those parasites who merely prey on information already in the public domain. A "whistleblower" sounds the alarm; he does not echo it. *Id.* at 1419.

The statute does not require the *qui tam* plaintiff to have direct and independent knowledge of all of the vital elements to a fraudulent transaction. As used in §3730(e)(4)(B), "information" is not equated with "transaction." It is sufficient if the *qui tam* plaintiff has direct and independent knowledge of any essential element of the underlying fraud transaction. *Quinn*, 14 F.3d at 656-67.

Whistleblower Protection

> *(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done . . . in furtherance of an action under this section . . . shall be entitled to all relief necessary to make the employee whole. . . . An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.*
> *31 U.S.C. § 3730(h).*

The FCA has a provision to protect "whistleblowers" that are discriminated against because they assist in the investigation or prosecution of a False Claims Act case. Such persons are entitled to reinstatement at their former level, twice the amount of back pay that was lost, interest on the back pay, compensation for any special damages, costs of litigation, and reasonable attorney's fees. The alleged harassing activity need not be in direct retaliation for filing a *qui tam* suit. Rather, protection extends to those who assist or testify for the litigant, as well as those who assist the government in bringing a false claims action.

Actions for retaliation under § 3730(h) must be brought by employees or former employees, and may not be brought by persons who are independent contractors. *See, e.g., Shapiro v. Sutherland*, 835 F. Supp. 202, 205 (D. Colo. 1990). However, the allegedly discriminating defendant need not be the direct or immediate employer of the plaintiff. *United States ex rel. Kent v. Aiello*, 836 F. Supp. 720, 724 (E.D. Cal. 1992).

To prevail on an FCA retaliation claim, a plaintiff must prove three elements:

1) the employee's conduct was protected under the FCA;

2) the employer knew that the employee engaged in such conduct; and

3) the employer took adverse action against the employee because of his or her protected conduct.

See, e.g., United States ex rel Karvelas v. Melrose-Wakefield Hosp., 2004 U.S. App. LEXIS 3238, *39-40 (1st Cir. 2004); *McKenzie v. BellSouth Telecomms., Inc.*, 219 F.3d 508, 514 (6th Cir. 2000); *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 736 (D.C. Cir. 1998). Once the employer has established a prima facie case of retaliation, the burden shifts to the employer to prove that the employee would have been terminated or subjected to adverse action even if he or she had not engaged in the protected conduct. *Melrose-Wakefield Hosp.*, 2004 U.S. App. LEXIS 3238, *1; *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 186 (3rd Cir. 2001), *cert. denied*, 536 U.S. 906 (2002).

To satisfy the first element of a cause of action under 31 U.S.C. § 3730(h), a plaintiff must demonstrate that he or she engaged in activity protected under the FCA. This element of retaliation does not require the plaintiff to have filed an FCA lawsuit or to have developed a winning claim at the time of the alleged retaliation. Rather, an employee's conduct is protected where it involves "acts done . . . in furtherance of" an FCA action. 31 U.S.C. § 3730(h). The statute's protection extends not only to actual *qui tam* litigants, but those who assist or testify for the litigant, as well as those who assist the government in bringing a false claims action. *Melrose-Wakefield Hosp.*, 2004 U.S. App. LEXIS 3238, at *42.

Courts have adopted various standards for determining whether conduct is "in furtherance" of an action under the FCA. Some courts have said that the plaintiff must be investigating matters which are calculated, or reasonably could lead, to a viable FCA action. Some have found that the activity is protected if litigation was a "distinct possibility" at the time that the employee made his or her disclosures to the employer. *Melrose-Wakefield Hosp.*, 2004 U.S. App. LEXIS 3238, at *41-42.

FALSE CLAIMS ACT

31 U.S.C. § 3729

THE KEY LANGUAGE OF THE FALSE CLAIMS ACT

(a) *Liability for Certain Acts*

Any person who -

(1) *knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;*

(2) *knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;*

(3) *conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;*

(4) *has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;*

(5) *authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;*

(6) *knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or*

(7) *knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,*

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .[7]

Subsections (1), (2), (3) and (7) are the most important subsections of § 3729(a). Subsections (4), (5), and (6) are rarely alleged and are seldom discussed in the reported court decisions. When preparing a fraud remedies plan, it is likely that Acquisition Fraud Counsel will focus primarily on subsections (1) and (2), which are alleged in most False Claims Act cases.

BRIEF OVERVIEW

The primary civil weapon in cases of fraud against the government is the False Claims Act, 31 U.S.C. §§ 3729-33, which provides the United States with a claim against any person who knowingly does the following:

(1) presents, or causes to be presented, a false or fraudulent claim for money or property against the United States;

(2) makes or causes to be made a false statement to get a false claim paid; or

(3) conspires to defraud the government by getting a false claim paid.

Liability under the False Claims Act is triple the amount of actual damages suffered by the United States plus a civil penalty in the amount of $5,500 to $11,000 for each violation ($5,000 to $10,000 for false claims before 30 August 1999).

Although the False Claims Act provides a general-purpose monetary remedy applicable to most frauds, other statutes establish causes of action for more specific forms of misconduct.

- The Contract Dispute Act, 41 U.S.C. § 604, contains an antifraud provision that bars submission of a false or unsupported claim to a government contracting officer.

- The Forfeiture of Fraudulent Claims, 28 U.S.C. § 2514, provides that a claim pending before the United States Court of Federal Claims shall be forfeited by any person who corruptly practices fraud in the proof or statement of the claim.

- The Anti-Kickback Act of 1986, 41 U.S.C. §§ 51-58, deals with illicit payments by a subcontractor to affect the award or performance of a government contract.

[7] Pursuant to the Debt Collection Improvement Act of 1996, for false claims after 30 August 1999, the penalties are $5,500-to-$11,000.

- The Ethics in Government Act, 41 U.S.C. § 423, provides penalties for specific actions that abuse the procurement process.

Other causes of action arise under the common law. Common law remedies for fraud, misrepresentation, payment by mistake, unjust enrichment, and breach of contract also are customarily pled as alternatives to statutory remedies. The government's common law right to recover funds wrongfully paid is well established. *See, e.g., United States v. General Dynamics Corporation*, 19 F.3d 770, 773 (2d Cir. 1994); *Safir v. Gibson*, 417 F.2d 972, 977 (2d Cir. 1969).

The Department of Justice has sole authority to take final action for all matters involving fraud. However, those actions are taken only after the Department of Justice has solicited and considered the client agency's recommendation. Under the Contract Disputes Act of 1978, neither a contracting officer nor an agency head has authority to compromise, pay or adjust a claim of fraud. 41 U.S.C. § 605(a) (2000). Any attempted settlements of civil fraud matters without the proper authorization of the Department of Justice are without force or effect. *See, e.g., United States v. Nat'l Wholesalers*, 236 F.2d 944, 950 (9th Cir. 1956), *cert. denied*, 353 U.S. 930 (1957); *Martin J. Simko Constr. Co. v. United States*, 852 F.2d 540 (Fed. Cir. 1988).

Even though the Department of Justice has sole authority over final action in fraud cases, if, in the context of deciding a contract dispute, a board of contract appeals decides disputed issues of fact that also bear on a fraud claim, then the board's factual findings can collaterally estop an action under the False Claims Act. *See, United States v. TDC Management Corporation, Inc.*, 24 F.3d 292 (D.C. Cir. 1994).

BRIEF HISTORY AND GENERAL CONSTRUCTION

The original False Claims Act was enacted during the Civil War in response to Congressional investigations into the sale of provisions and munitions to the War Department. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000); *United States v. Bornstein*, 423 U.S. 303, 309 (1976). The False Claims Act has been amended several times. The most significant amendments were in 1986 when Congress rewrote much of the Act. The 1986 amendments made several important changes, including the following:

- "Knowing" and "knowingly" are expressly defined to include actual knowledge, deliberate ignorance, or reckless disregard for the truth or falsity of the information. § 3729(b).

- No specific intent to defraud is required. § 3729(b).

- The burden of proof is defined as a preponderance of the evidence. § 3731(c).

- Reverse false claims are expressly actionable. § 3729(a)(7).

- The Attorney General is authorized to issue pre-suit civil investigative demands. § 3733.

Before the 1986 amendments, the Supreme Court characterized an action under the False Claims Act as remedial and its sanctions as civil. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). However, since the 1986 amendments, the Supreme Court has acknowledged that "the current version of the Act imposes damages that are essentially punitive in nature . . . ." *Vermont Agency of Natural Res.*, 529 U.S. at 784. Nonetheless, even though the Act is essentially punitive in nature, courts have not applied restrictive construction under the rule of lenity applicable to criminal law statutes. Rather, the court have held that the FAC should be broadly construed and applied as a remedial statue reaching beyond claims that might be legally enforced, to all fraudulent attempts to cause the government to pay out sums of money. *See, e.g., United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1986).

FUNDAMENTALS OF A FALSE CLAIMS ACT CASE

A. Persons subject to suit

The False Claims Act provides that "any person" may be liable under the Act. The word "person" includes corporations, partnerships, companies, and associations, as well as individuals and members of the armed forces. *See* 1 U.S.C. § 1 (2000). Corporations and other business entities can be liable vicariously for the acts of their employees committed within the scope of employment, under the well-established doctrines of *respondeat superior* and apparent authority. *See, e.g., United States v. Am. Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970) (setting forth the pertinent standard).

It is not necessary that the government prove high-ranking persons within the company approved, acquiesced in, or condoned the criminal activity. *See, e.g., United States v. Dye Constr. Co.*, 510 F.2d 78, 82 (10th Cir. 1975). Moreover, a corporation may in certain circumstances be held liable for the acts of employees of subsidiary companies if the government proves that the subsidiary was the parent company's agent and was acting within the scope of its authority to benefit the parent company. *See United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989).

The government must prove the employee intended to benefit the company, but it is not necessary that the company actually receive the intended benefit. *United States v. Gold*, 743 F.2d 800, 823 (11th Cir. 1984). The corporate employee need not act solely or even predominantly with the intent to benefit the corporate principal. *United States v. Sun-Diamond Growers*, 138 F.2d 961 (D.C. Cir. 1998). An employee's or agent's conduct which is actually or potentially detrimental to the company may nonetheless be imputed to the company if the conduct was motivated in part to benefit the company. *United States v. Automated Med. Lab., Inc.*, 770 F.2d 399, 406-07 (4th

Cir. 1985). Furthermore, a company can be liable for the acts of its employees within the scope of their employment, even though the employee acted contrary to general corporate policy or express instructions. *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972).

A corporation is responsible for the collective or cumulative knowledge of its employees and can be held liable even though the employee who submits a claim is different than the employee who knows that the claim is false. *See generally, United States v. Bank of New England, N.A.*, 821 F.2d 844 (1st Cir. 1987). In other words, one employee may commit the fraudulent act of making or presenting the claim, and a different employee may have the fraudulent intent required by § 3729(b) of the Act.

B. What is a claim?

Until 1986, the Act did not define the pivotal word "claim." The 1986 amendments to the Act added the following definition at § 3729(c):

> *For the purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.*

Under this definition, a claim is within the Act if a person makes the claim against anyone and the amount claimed is paid or reimbursed by the government. The actual form of the claim may vary, ranging from invoices, to applications for grants, to requests for equitable adjustments. The Supreme Court has said that the False Claims Act is a "remedial statute [that] reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *Neifert-White*, 390 U.S. 228. Thus, the term "claim" is broadly construed.

However, the False Claims Act does not reach every questionable demand for payment. For example, there is a distinction between a false claim and a breach of contract where the breach is not accompanied by evidence of fraud. *See, e.g., Tyger Constr. Co. Inc. v. United States*, 28 Fed. Cl. 35, 36 (1993) (holding False Claims Act liability did not attach to a good faith legal opinion that a construction project was substantially complete).

C. When is a claim against the government?

The False Claims Act covers claims presented to "an officer or employee of the United States Government or a member of the Armed Forces of the United States." § 3729(a). The requirement that the claim be presented to the Government raises two issues:

(i) whether the paying entity is in fact part of the government; and

(ii) whether a claim presented to a non-government intermediary that eventually reaches the United States violates the Act.

1) Non-appropriated fund activities

Whether an entity is a government instrumentality for purposes of the False Claims Act typically involves an assessment of any enabling legislation that created the entity, any features that demonstrate federal control over its operations or finances, and the relationship between the entity's functions and purposes and an identifiable federal interest.

A number of Government related activities are conducted without federal appropriations. The various non-appropriated fund activities, such as the Army and Air Force post exchanges are familiar examples. The Congress does not directly appropriate money for their operation and does assume their financial obligations. On the other hand, such activities have received statutory recognition and encouragement and are supervised by the military departments.

Although the reported decisions are not entirely consistent, the Department of Justice's position is that the False Claims Act covers non-appropriated fund activities. One decision said that the method of funding may not be dispositive, and on that reasoning the False Claims Act could apply to a military post exchange. In *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485 (1942), a case concerning the immunity of a post exchange from state taxation, the Court ruled that post exchanges are "arms of the Government deemed by it essential for the performance of governmental functions" and "integral parts of the war Department. However, in *United States v. Howell*, 318 F.2d 162 (9th Cir. 1963), the Ninth Circuit refused to treat underreporting of a concessionaire's profits (a portion of which were paid to a post exchange) as a claim that violated the False Claims Act.

2) Claims submitted to intermediaries

In many cases, fraudulent claims are presented to the United States by someone other than the person who committed the fraud. These cases involve the wrongdoer presenting a false claim to a third party who in turn, and perhaps innocently, presents a claim to the United States which contains or reflects the false claim. The chain between the wrongdoer and the United States may be long or short. There person who committed the fraud has caused a false claim to be made or presented to the United States and is liable under the False Claims Act. 31 U.S.C. §§ 3729(a), (c). Under § 3720(c), quoted above, a claim is within the False Claims Act if a person makes the claim against anyone, and the amount claimed is paid or reimbursed by the government. Thus, false claims that subcontractors submit up the chain and which

prime contractors eventually incorporate into their claims to the government are within the False Claims Act.

Nonetheless, care should be taken when assessing possible cases against government subcontractors to understand the contractual arrangements that exist both between the subcontractor and the prime contractor, and between the government and the prime contractor. For example, a subcontractor's fraudulently inflated demand to a prime contractor may not result in damage to the government if the amount paid to the prime contractor was fixed before or independently of the subcontractor's submission of its fraudulently inflated bid. Of course, a subcontractor's knowing delivery of substandard goods or services will almost always violate the Act.

3) Foreign Military Sales (FMS) funds

The False Claims Act has been read broadly to include any money available to the United States Treasury, including funds deposited by foreign governments in the FMS trust fund. *See United States ex rel. Campbell v. Lockheed Martin Corp.*, 2003 WL 22128833 (M.D. Fla. 2003).

D. When is a claim false or fraudulent?

Actionable false claims come in many forms. Fraud can occur by false statements, by the failure to disclose material information, or by misleading conduct as, for example, in a collusive bidding case. *See, e.g., Hess*, 317 U.S. at 543-44. As a general proposition, if a person submits a swollen invoice or similar demand for payment, then the swollen portion is damage that may be trebled under the Act, and the invoice provides the basis for a civil penalty.

Submitting fraudulently inflated claims for payment are distinguishable from simply submitting an inflated bid. As one court said, "if someone offers to do a $300 job for $500 and the bid is accepted, there is no basis in law or logic, absent fraud, for denying the bidder his profit." *United States v. Systron-Donner Corp.*, 484 F.2d 249, 252 (9th Cir. 1973). In contrast, an inflated bid combined with a kickback would be a false claim. *See, e.g., Murray & Sorenson, Inc. v. United States*, 207 F.2d 119 (1st Cir. 1953). And the knowing submission of false cost or pricing data in connection with a proposal, in contravention of the requirement in the Truth in Negotiation Act that such data be accurate, complete and current, 10 U.S.C. § 2306(f), violates the False Claims Act.

Many False Claims Act cases involve fraud in the performance of a contract. In such cases, typically substandard commodities not meeting contract specifications are palmed off on the government, often at inflated prices. These cases involve such activities as: the circumvention of inspection procedures, the bribery of inspectors; the fabrication of false inspection reports; the rigging of product tests; the mislabeling of products; the purchase of low grade basic materials; and the use of false financial accounting and progress reports. Since government contracting procedures normally

require certification by the claimant that its bill is correct and fair, the products meet specifications, or the contractor is entitled to payment, certification that is knowingly false is a basis for liability under the Act.

Many false claims cases involve express false certifications, and there seems to be no dispute that express false certifications violate the Act. *See. e.g., United States ex rel. Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776 (4th Cir. 1999); *United States ex rel. Thompson v. Columbia HCA*, 125 F.3d 899 (5th Cir. 1998).

A number of courts have recognized implied certification as a basis for False Claims Act liability. As of this writing, five circuits have endorsed this theory. *See United States v. TDC Mgmt. Corp., Inc.*, 288 F.3d 412 (D.C. Cir. 2002); *United States ex rel. Mikes v. Strauss*, 274 F.3d 687 (2d Cir. 2001); *United States ex rel. Augustine v. Century Health Serv.*, 289 F.3d 409, 415 (6th Cir. 2002); *United States ex rel. Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 531-33 (10th Cir. 2000); *Ab-Tech Constr., Inc. v. United States*, 57 F.3d 1048 (Fed. Cir. 1995). There are two requirements for an implied certification claim:

(1) By submitting the claim the defendant impliedly certified compliance with a statutory, regulatory or contractual provision that was violated; and

(2) Compliance with the statutory, regulatory of contractual provision was a prerequisite to payment.

As mentioned above, there is an important distinction between fraud and breach of contract. Breaches of contract are not false claims unless they are accompanied by evidence of fraud. In *Tyger Constr. Co. Inc.*, 28 Fed. Cl. at 36, the court said that False Claims Act liability did not attach to a good faith legal opinion that a construction project was substantially complete. In *United States ex rel. Compton v. Midwest Specialties, Inc., et al.*, 142 F.3d 296, 304 (6th Cir. 1998), the court said a "mere breach of contract, without any evidence of scienter, is insufficient to establish liability under the False Claims Act."

However, the contractor must act with the good faith belief that he is complying with the terms of the contract. In *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998), the court said,

> *[if] a contractor submits a claim based on a plausible but erroneous contract interpretation, the contractor will not be liable, absent some specific evidence of knowledge that the claim is false or of intent to deceive. Yet when a contractor adopts a contract interpretation that is implausible in light of the unambiguous terms of the contract and other evidence (such as repeated warnings from a subcontractor or the fact that the interpretation is contrary to well-established industry practice), the contractor may be liable under the FCA or the CDA even in the absence of any deliberate concealment or misstatement of facts. Under such*

circumstances, when the contractor's purported interpretation of the contract borders on the frivolous, the contractor must either raise the interpretation issue with government contracting officials or risk liability under the FCA or the CDA.

The holding was similar in *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1008 (5th Cir. 1972) (holding a contractor's failure to disclose the manner in which it thought it could comply with the contract "indicates nothing less than an intention to deceive").

E. Knowledge and intent

The False Claims Act, § 3729(b), provides in pertinent part:

For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information -

(1) has actual knowledge of the information;

(2) acts with deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

This section applies to all seven violations of the Act. Therefore, in plain language, the caveat that no proof of specific intent is required must extend to all parts of that section as a matter of statutory construction.

1) The government need not prove specific intent to defraud

This language makes clear that no specific intent is necessary and mere knowledge that the claim is false, or even constructive knowledge, is sufficient. Further, by defining "knowing" and "knowingly" to include claims presented in "deliberate ignorance" or "reckless disregard" of the truth or falsity of information contained in the claim, the Act imposes a duty of reasonable inquiry into the truth of the claim. In the 1986 amendments to the False Claims Act the scienter standard was eased in order to preclude 'ostrich' type situations where an individual has 'buried his head in the sand' and failed to make inquiry that would have revealed the false claim. Thus, actual knowledge is not a prerequisite to liability—constructive knowledge will suffice. *United States v. Entin*, 750 F. Supp. 512, 518 (S.D. Fla. 1990).

It follows that an employer will not be able to escape liability by proving its ignorance of an employee's false statements. The employee's knowledge that a claim is false will be imputed to his or her employer.

Defendants may also be liable for implicit false statements or omissions that render a claim false or misleading.

Although the government need no prove that the defendant acted with specific intent to defraud, the government must prove the defendant knowingly submitted a false claim, as defined by the statute. Neither innocent mistakes nor mere negligence will support an action under the Act. *Taber Extrusions, LP*, 2003 U.S. App. LEXIS 17896, p. 5; *United States v. ex rel. Quirk v. Madonna Towers, Inc.*, 278 F.3d 765, 767 (8th Cir. 2002); *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1420-21 (9th Cir. 1992).

2) Impact of the government's knowledge

A related issue is whether the government's knowledge that the claim is false when made provides a defense to an action under the False Claims Act or in any way precludes recovery. As a general rule, the government's knowledge does not bar a false claims action. *See, e.g., United States ex rel. Kreindler & Kreindler .v United Tech.*, 985 F.2d 1148, 1156 (2d Cir.), *cert. denied*, 113 S.Ct. 2962 (1993) (stating "the basis for an FCA claim is the defendant's knowledge of the falsity of its claim . . . which is not automatically exonerated by any overlapping knowledge by government officials"); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1616, 1421 (9th Cir. 1991) (stating "the requisite intent is the knowing presentation of what is known to be false. That the relevant government officials know of the falsity is not itself a defense.").

Nevertheless, the government's knowledge may be relevant if it tends to negate the defendant's knowledge that its claim is false, contrary to the terms of the contract, or in violation of program regulations. In *United Technologies, supra*, 985 F.2d at 1157, the court stated:

> *The fact that a contractor has fully disclosed all information to the government may show that the contractor has not "knowingly" submitted a false claim, that is that it did not act with "deliberate ignorance" or reckless disregard of the truth."*

Accord, FMC Corp., 975 F.2d at 1421 (stating "the fact that the government knew of FMC's mistakes and limitations, and that FMC was open with the government about them suggests that while FMC might have been groping for solutions, it was not cheating the government in the effort."); *Taber Extrusions, LP,* 2003 U.S. App. LEXIS 17896 (holding the fact the government paid an invoice even though it knew that the subcontractor used a pro forma invoice to receive payment without delivering any goods to the prime contractor is evidence that defendant did not knowingly submit a false claim).

F. Materiality

A claim or a statement is material if it has a natural tendency to influence the decision maker–that is, would a true statement have made a difference? Materiality is closely related to the concept of reliance. In common law fraud, the plaintiff must prove that he relied on the false statement to his detriment. The False Claims Act does not expressly require the government to prove that a claim or statement is false in a "material" respect. It does not expressly require proof that the government paid the claim in reliance on the falsity of the claim or statement. The Department of Justice's position is that materiality is not an essential element of a cause of action under the Act.

However, courts have read an element of materiality into the Act. *See, e.g., Tyger Constr. Co.,* 28 Fed. Cl. at 55 (stating "the FCA covers only those false statements that are material. Otherwise, contractors could face FCA liability for mere clerical errors."). The materiality element has been inferred from the language of the damages section of the Act that specifies that recoverable damages are those sustained "because of" the defendant's act.

However, often the treatment of this element is not always logical. For example, in False Claims Act cases, materiality is a concept related to the government's proof of damages. In cases where the government has discovered a wrongdoer's fraud before payment, courts have expressly rejected the contention that "reliance," a closely allied concept, is required to establish a violation. *See United States v. Rapoport*, 514 F. Supp. 519, 523 (S.D.N.Y. 1981) (rejecting the argument that the government must establish reliance to recover penalties under the statute). Nonetheless, it is prudent to consider materiality to be an element of an action under the False Claims Act.

G. Damages

1. General

A person who violates the False Claims Act is liable to the United States for three times the amount of damages that the government sustains "because of" the act of that person. 31 U.S.C. § 3729(a) (2000). There is no set formula for measuring damages under the Act, and damages can be measured in a variety of ways. *United States v. Killough*, 848 F.2d 1523, 1531 (11th Cir. 1988), quoting the legislative history of the 1986 amendments:

> *No single rule can be, or should be, stated for the determination of damages under the Act . . . Fraudulent interference with the government's activities damages the government in numerous ways that vary from case to case. Accordingly, the committee believes that the courts should remain free to fashion measures of damages on a case by case basis. The Committee intends that the courts should be guided only by the principles that the United States' damages should be liberally measured to effectuate the remedial purposes of the Act, and the United States should be afforded a full and complete recovery of all damages.*

Id. at 1532

The measure applied by the court in a specific case is greatly influenced by the nature of the fraud and the type of government transaction affected by it. In all cases, it is important to recall the language of the Act, which provides for recovery of such damages as the government sustains "because of" the violation. In *Hess*, 317 U.S. 537, the Court measured the damages as the amount that the government would not have paid had it known the true facts. Other courts have followed this approach. *See, e.g., United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir. 1966) (stating "the measure of the government's damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful"). Similarly, in *Toeplman v. United States*, 263 F.2d 697 (4th Cir. 1959), the defendant submitted false statements to secure government subsidized loans ("cotton producer's loans). The government delayed foreclosing on the loans and when it did so the price of cotton had dropped, causing a loss to the government, which the government would not have incurred by timely foreclosure. Because of the government's delay, arguably the false statements did not cause the loss. Nonetheless, the court imposed damages stating that ["b]ut for the fraud the cotton would never have been the Government's responsibility . . . . The fraud was the effecting cause of the loss . . . ." *Id.* at 700.

A further general point is that the False Claims Act imposes damages that are essentially punitive in nature. *Vermont Agency of Natural Res.,* 529 U.S. 765. Although at one time it was suggested that FAC damages were remedial rather than punitive, *Bornstein*, 423 U.S. at 315, that is not the current interpretation of the Act.

2. Intangible Losses

In most cases, the government incurs a tangible, out-of-pocket loss, but there is authority for the proposition that the government can be awarded damages even though it has not suffered traditional pecuniary loss.

In *United States v. Killough*, 848 F.2d 1523, 1531 (11th Cir. 1988) the defendants were government employees who took kickbacks in return for awarding contracts. The defendants offered evidence at trial that other contractors submitted bids that were as much as, if not more than, the bids defendants submitted to the government. Defendants contended that this evidence proved the government could not find a better price for the work, and thus the government suffered no actual damages. The court said "[w]e are not persuaded by this argument. Not only does it ignore contrary evidence put on by the government, but also it infers that paying kickbacks to get government contracts would be legitimate so long as no one else submitted a lower bid. When an official acting on behalf of the government receives money to which he is not entitled for the purpose of inducing that official to act in a certain manner, the government has been damaged to the extent that such corruption causes a diminution of the public's confidence in the government [citations omitted] as well as by any excess money it paid and the administration costs of prosecuting the case." *Id.*

Killough can be read as standing for the proposition that the government's damages are not limited to traditional breach contract damages—*i.e.*, benefit of the bargain damages, out-of-pocket losses, tangible losses. The government's actual damages include intangible losses, such as of the public's confidence in the government or breach of Congressionally mandate policy, such as laws protecting domestic industries.

3. Market Value

In *Bornstein*, 423 U.S. at 316 n.13, the Court used market value to measure the damages. The Court said in a footnote that the government's damages are equal to the difference between the market value of product received by the government and the market value of the product if it had been of the specified quality. The footnote in *Bornstein* is significant for two reasons. First, it apparently approves the benefit of the bargain rule as a measure of damages in a False Claims Act suit. Second, by its citation to other cases that measure damages under a variety of theories, the Supreme Court in *Bornstein* appears to have endorsed the possibility of alternative measures and flexibility in assessing the government's damages under the Act.

Market value is not always easily ascertainable or provable. In *Faulk v. United States*, 198 F.2d 169 (5th Cir. 1952), the court measured the damages based on the percentage of the defective product (milk) that was left unused. In *Bornstein,* the Court seems to have assumed that the defective product had some market or resale value that should be included in the measure of damages. In *United States v. Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972), the defendants delivered counterfeit engine bearings, and the court ruled that the government never got what it contracted to receive. Therefore, the bearings had no value to the government, and the measure of damages was the full amount paid. On the other hand, in *United States v. Collyer Insulated Wire Co.*, 94 F. Supp. 493 (D.R.I. 1950), the court refused to find that the inferior wire and cable were worthless.

4. Damages Shaped by Defective Cost or Pricing Data

In *United States v. Foster-Wheeler Corp.*, 316 F. Supp. 963 (S.D.N.Y. 1970), *aff'd in part, rev'd in part on other grounds*, 447 F.2d 100, 102 (2d Cir. 1971), the contractor was required to submit accurate cost and pricing data on the basis of which the contract price was negotiated. Foster-Wheeler's data later proved to be fraudulently inflated. The court calculated damages by projecting a negotiated price based on corrected data and subcontracting that figure from the contract price paid by the government.

5. Consequential Damages

The False Claims Act does not define the scope of includable damages, and as a result the courts have struggled with the issue of consequential damages and whether they are includable in the damages to be multiplied under the Act. In *Hess,* 317 U.S. at 549-552, in dictum the court said that the purpose of the Act is to provide complete

indemnity and to make the government completely whole, suggesting that consequential damages should be recoverable. In *Toepleman v. United States, 263 F.2d 697* (4th Cir. 1959), *cert. denied sub nom., Cato Brothers, Inc. v. United States*, 359 U.S. 989 (1959), the court permitted consequential damages by allowing the government to recover a loss from the sale of collateral in a falling market. However, in *Aerodex, Inc.*, 469 F.2d at 1011 (5th Cir. 1972), the court held that consequential damages were not recoverable, limiting the government's recovery to the cost of the discrepant bearings, but not including the consequential costs of replacing the bearings in aircraft engines.

In *United States v. Ekelman & Assoc., Inc.*, 532 F.2d 545 (6th Cir. 1976), the court attempted to reconcile the *Toepleman* and *Aerodex* decisions. The defendant had submitted fraudulent applications for federally insured mortgages. Upon default, the government had to satisfy the loans and take possession of the property. In addition to recovering the payments to discharge the loans, the court allowed the government to recover its costs in maintaining the properties. Although the decisions are not consistent, what is clear is that in attempting to recover damages that flow from the false claim, the damages should not be labeled "consequential damages." Rather, damages should be shown to be the natural and proximate result of the defendant's fraud.

6. False Progress Payments

Another damages issue is how to measure the government's loss due to a false claim for a progress payment under a fixed price contract. There are three possible measures of damages:

(1) civil penalties only (assuming that the government eventually gets what it paid for;

(2) the interest lost because of the premature payment, trebled, plus penalties; and

(3) the accelerated portion of the false payment request, trebled, plus penalties.

The first measure should be rejected because interest is a very real loss and in many cases substantial. Usually, the second measure is less favorable to the government than the third measure.

The third measure is supported by *Young-Montenay, Inc. v. United States*, 15 F.3d 1040 (Fed. Cir. 1994). Young-Montenay submitted an altered invoice in support of a progress payment, accelerating the payment under the contract by $49,000. Concluding that the claim was false and that the "government was damaged by paying money before it was due," the Federal Circuit affirmed the award of three times the accelerated portion of the claim (3 x $49,000) plus a $5,000 penalty. The court

expressly rejected Young-Montenay's argument that the government's loss was limited to its actual lost interest on the $49,000 paid prematurely, holding that the government sustained an actual loss beyond interest.

7. Falsified Test Data

Cases involving falsified test data include both the failure to perform tests required by the contract and the falsification of data when tests are performed. In either case, the government's loss can be measured either by the diminished value of the product as a result of the failure to test or to report test data accurately, or by the inflated cost of the untested or poorly tested product.

The first measure of damages, *diminished value*, analogizes falsified test data cases to cases involving product substitution or defective parts. Under this measure, the government's damage is the difference between the value of the product specified in the contract, fully and successfully tested, and the diminished value of the product delivered. *See Bornstein*, 424 U.S. at 316 n.13. As in product substitution cases and defective product cases, there are times when the product delivered has no value to the government and, therefore, the government's damage is the full price paid for the contract. *See Aerodex, Inc.*, 469 F.2d at 1011.

The second measure of damages, *inflated cost*, covers the case in which the delivered product may meet contract standards despite the contractor's failure to conduct the tests required under the contract—*i.e.,* there is no diminution in value. Nevertheless, the government suffers a loss in that it paid for certain services—*i.e.*, tests—that were not performed.

8. Proof of Damage Amount

Although damages cannot be based on mere "speculation or guesswork," they need not be proven with mathematical certainty. *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 264 (1946). Although speculation and guesswork cannot be the basis for ascertaining damages, *United States v. Collyer Insulated Wire Co.*, 94 F. Supp. 493, 498-99 (D.R.I. 1950), damages need not be calculated by mathematical precision. It has been said that even where the defendant by his own wrong prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances "juries are allowed to act upon probable and inferential as well as [upon] direct and positive proof. *United States v. Killough*, 848 F.2d 1523, 1531 (11th Cir. 1988).

9. Computation of Multiple Damages

The False Claims Act provides for treble damages, or not less than double damages if there is voluntary disclosure within the provisions of the Act. 31 U.S.C. § 3729(a) (2000). The government's actual damages should be multiplied by the

appropriate factor before deducting any compensatory payments made to the government. *Bornstein*, 423 U.S. at 314-17.

In *Bornstein*, a subcontractor supplied substandard electron tubes to the prime contractor, which the prime contractor used in radio repair kits sold to the government. Upon discovery of the fraud, the government and the prime contractor agreed to a settlement by which the government recovered $40.72 per tube. The replacement cost of the tubes was $40.82 per tube. The United States then sued the subcontractor under the False Claims Act. The district court ruled that the government could recover double the 10-cent difference between the replacement cost and the settlement amount. The Supreme Court reversed, holding that the replacement cost ($40.82 per tube) should first be doubled before the settlement amount ($40.72 per tube) was deducted, when doing the final calculation of damages.

The Court reasoned that computing damages by this method conforms to the language and purpose of the Act to make the government whole. It compensates the government for the cost, delay and inconvenience caused by the fraud, and it fixes liability on the defrauder without reference to the adventitious acts of others. It also maximizes the deterrent impact of treble damages.

H. Penalties

A person who violates the False Claims Act is liable for a civil penalty in an amount which is currently $5,000 to $10,000 for false claims occurring before 30 August 1999, and, pursuant to the Debt Collection Improvement Act of 1996, $5,500 to $11,000 for false claims after 30 August 1999.

1. Actual damage is not required

The government need not prove actual damages to recover penalties under the Act. *See, e.g.,United States ex rel. Varljen v. Cleveland Gear Co., Inc.*, 250 F.3d 426, 429 (6th Cir. 2001); *Commercial Contractors, Inc. v. United States,* 154 F.3d 1357, 1371 (Fed. Cir. 1998); *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429, 434-35 (1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995). The lack of proof of a specific amount of damages, therefore, should not be regarded as sufficient reason for not bringing an otherwise actionable suit under the Act. It is also important to remember that no proof of reliance upon a defendant's false claim or statement is required in order to recover civil penalties. Civil penalties are designed particularly to reach the wrongdoer who is caught before his deceit is consummated by a government payment.

2. Number of penalties

The government can recover a statutory penalty for each false claim. This does not mean that the government can recover a penalty for every false statement that may support a claim or for every piece of paper submitted in connection with a claim. It is

also true, however, that the language of the Act focuses on false claims, not on contracts. *Bornstein*, 423 U.S. at 311.

A single contract could result in multiple false claims. In computing the number of false claims, the focus should be on the false conduct that caused the erroneous payments. *Id.* at 313. Whether a defendant has made one false claim or many is a fact-bound inquiry that focuses on the defendant's specific conduct. As a general proposition, the number of false claims equals the number of the defendant's causative acts resulting in payment. *United States v. Krizek*, 111 F.3d 934, 939 (D.C. Cir. 1997). For example, three separate invoices would be three claims and three penalties. Similarly, requests for three separate progress payments would be three claims and three penalties.

A single false statement to obtain a contract that results in subsequent multiple payments will usually result in multiple penalties rather than one. *See, e.g., Bornstein*, 423 U.S. at 311 (stating "the language of the statute focuses on false claims, not contracts). However, the courts will not allow claims for each of the myriad of documents that often accompany a claim and will limit the civil penalties to the individualized, separate and distinct violations. The way that bills are consolidated can affect the number of claims. *See Miller v. United States*, 213 Ct. Cl. 59 (1997) (holding five forfeitures should be awarded where defendant prepared eleven invoices that contained false claims but consolidated them and submitted them on a monthly basis over five months).

A separate civil penalty is recoverable for a violation of the conspiracy clause of the Act. 31 U.S.C. § 3729(a)(3) (2000).

I. Statute of limitations

The limitations period for actions under the FCA is set forth at 31 U.S.C. §3731(b), which provides that an action may not be brought:

- more than 6 years after the date on which the violation of section 3729 was committed; or
- more than 3 years after the date when the material facts showing a violation were known or should have been known by the U.S. government official responsible for acting in the circumstances; but
- in no event more than 10 years after the date on which the violation occurred;
- whichever occurs last.

Thus, if the material facts are concealed, then it is possible for an action to be brought up to 10 years after the false claim.

THE SIX MOST COMMON CIVIL FALSE CLAIMS ACT CASES

The False Claims Act provides for seven separate causes of action, which can be conveniently summarized as follows:

- Presentation of a false claim for payment - § 3729(a)(1)
- Making a false statement to get a false claim paid - § 3729(a)(2)
- Conspiring to defraud the United States - § 37299(a)(3)
- Shortchanging the United States on amount of money or property delivered to the United States - § 3729(a)(4)
- Issuing receipt for property or money of the United States without knowing whether the information is true - § 3729(a)(5)
- Buying public property from a government employee knowing that the employee has no authority to sell - § 3729(a)(6)
- Concealing, avoiding or decreasing an obligation to pay the United States - § 3729(a)(7)

One knowledgeable commentator on the False claims Act has said that "[t]here are as many 'types' of False Claims Act cases as there are False Claims Act defendants." John T. Boese, Civil False Claims and Qui Tam Actions, 2nd ed., § 1.06. Although that statement is literally true, there are six general categories into which most of these cases fall. These general categories are relevant in calculating damages as well as bringing a sense of order to the types of actions that fall within the scope of the statute and to our analysis of them.

1) "Mischarge" case

The common element of mischarge cases is a claim for goods or services that were not provided in the manner stated in the claim. One example is an invoice submitted to the government for goods or services that were not delivered. Another example is the overcharge case in which the contractor bills the government for higher priced goods or services than actually provided. The mischarge case is the most common and the most straightforward of False Claims Act cases.

2) "Fraud-in-the-inducement or false negotiation" case

This includes a variety of situations arising from the contractor's false statements or actions that induce the government to agree to inflated prices. The defective pricing case, in which the contractor's submission of false data causes the government to pay inflated prices, is an example of a fraud-in-the-inducement case.

3) "False certification" case

In these cases, the contractor makes a false certification of statutory or regulatory compliance, or of the existence or non-existence of certain conditions, which are a prerequisite to the government's payment. An example is a case in which the contractor certifies that a product has been tested in accordance with mandated procedures or specifications, when the product has not been so tested.

4) "Substandard product or service" case

The substandard product case is one in which the contractor delivers an inferior substitute in place of the product required by the contract. These cases often overlap with the mischarge case and the false certification case.

5) "Fraudulent accounting" case

Although fraudulent accounting cases can be as diverse as imagination permits, in the realm of government contracting an accounting fraud case usually involves using the "blue smoke and mirrors" of creative accounting to make an unallowable cost to look like an allowable cost. Often un-reimbursable costs are shifted from a fixed price contract to a cost reimbursable contract.

6) "Reverse false claims" case

In a reverse false claims case, the defendant makes false statements or commits fraudulent conduct to decrease an obligation to the United States.

Elements

The elements for each of the causes of action under the Act, 31 U.S.C. § 3729(a)(1), (2), (3) and (7), are set forth below. Because subsections (4), (5) and (6) are almost never alleged or litigated, and because it is highly unlikely that they will be ever encountered, the elements of those sections are not discussed.

As a general point, it is useful to bear in mind that all seven of the statutory causes of action have the same basic elements:

- Claim
- Submitted to the United States
- Claim was false
- Defendant acted knowingly

- The falsity was material

Presentation of a false claim for payment - § 3729(a)(1)

Knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

To prove a violation of Subsection (a)(1), the plaintiff must prove four elements:

Element 1 A person must present, or cause another person to present, a " claim" for payment or approval to the United States;

Element 2 The claim must be false or fraudulent;

Element 3 The person must act knowing that the claim is false; and

Element 4 The falsity was material.

Proof Chart

Element	Synopsis of Evidence
presentation of a claim	
claim is false or fraudulent	
knowledge	
materiality	

Making a false statement to get a false claim paid - § 3729(a)(2)

knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

To prove a violation of Subsection (a)(2), the plaintiff must prove four elements:

Element 1 A claim was presented to the United States;

Element 2 A person made a false statement or record for the purpose of securing payment of the claim;

Element 3 The person making the false statement or record acted knowingly—*i.e.* knew that the statement or record was false and acted for the purpose of securing payment of a claim; and

Element 4 The falsity was material.

Proof Chart

Element	Synopsis of Evidence
presentation of a claim	
claim is false or fraudulent	
knowledge	
materiality	

Conspiring to defraud the United States by getting a false claim paid - § 3729(a)(3)

Conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

To prove a violation of this subsection of the False Claims Act, the plaintiff must prove six elements:

Element 1 A claim to the United States;

Element 2 Which is false or fraudulent;

Element 3 An agreement (conspiracy) among two or more persons to submit the false claim;

Element 4 An act in furtherance of the agreement; and

Element 5 Defendant acted knowingly as defined by the Act.

Element 6 The falsity was material.

For more information on the general law of conspiracy, the reader should consult the section of this reference guide that discusses conspiracy under 18 U.S.C. § 371.

Proof Chart

Element	Synopsis of Evidence
presentation of a claim	
claim was false or fraudulent	
agreement	

act in furtherance of agreement	
knowledge	
materiality	

Reverse False Claim - § 3729(a)(7)

Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government . . . .

To prove a violation of this subsection of the False Claims Act, the plaintiff must prove five elements:

Element 1 The defendant had an existing obligation to pay money or to transfer property to the Government;

Element 2 The defendant made, used, or caused someone else to make or use, a false record or a false statement;

Element 3 The defendant acted to conceal, avoid or decrease his obligation to the Government;

Element 4 The defendant acted knowingly when making or using the false record or statement or causing it to be made; and

Element 5 The falsity was material.

Before the False Claims Act was amended in 1986, courts generally held that the Act covered only fraudulently procuring something of value from the Government. It did not cover fraudulently reducing a person's obligation to the Government. *See, e.g., United States v. Howell*, 318 F.2d 162, 166 (9th Cir. 1963). In 1986, Congress enacted subsection (a)(7) which over-rules those holdings and make it a violation of the Act to use a false record or statement to decrease an obligation to the United States.

After the 1986 amendments, a few cases held that "obligation" included a potential future obligation that might arise, for example, from violating a law or regulation. Therefore, a false statement or record used to avoid a future obligation violated the Act. *See Civil False Claims and Qui Tam Actions*, John T. Boese, 2d Ed., § 2.01[G]. However, the prevailing view is that subsection (a)(7) reaches only existing obligations, precluding its use for contingent future obligations. There must be an existing obligation at the time of the fraudulent act.

"A reverse false claim cannot proceed without proof that the defendant made a false record or statement at a time that the defendant owed to the government an

obligation sufficiently certain to give rise to an action for debt at common law . . . ." *American Textile Mfrs. Inst., Inc. v. Limited, Inc.*, 190 F.3d 729 (6th Cir. 1999). In *American Textile*, the *qui tam* plaintiff alleged that defendants made false statements to avoid paying avoid paying customs duties. The defendants allegedly mislabeled imported clothing. The alleged mislabeling were proven true, then the defendants would also have been liable for fines and penalties. The court held that such potential liability for added customs duties and fines and penalties was contingent at the time the defendants made the allegedly false statements. There was no obligation to pay the United States money or property at the time of the false statements.

Proof Chart

Element	Synopsis of Evidence
existing obligation to government	
false record or statement	
to conceal, avoid or reduce obligation	
knowledge	
materiality	

FALSE CERTIFICATION AS A BASIS FOR FALSE CLAIMS ACT LIABILITY

Introduction

The False Claims Act ("FCA"), 31 U.S.C. § 3729(a)(1), (2), imposes liability on persons who knowingly present false or fraudulent claims for payment or approval or who knowingly make false records or statements to get a false or fraudulent claim paid or approved. The plaintiff must prove as an essential element of proof that there was a false claim. A false claim may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation. The FCA aims at retrieving ill-begotten funds and is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968).

One way to prove the essential element of a false claim is to prove that the defendant knowingly made a false certification of compliance. Liability under the false certification theory can be based on a false description of the goods or services provided or on a false statement of compliance with a statute, regulation or contract clause. *See, e.g., United States ex rel. Mikes v. Straus*, 274 F.3d 687, 696-97 (2d Cir. 2001). False certifications of compliance can be either express certifications or implied certifications.

Courts in a variety of contexts have found violations of the FCA when: (i) a government contract or program required compliance with certain conditions as a prerequisite to a government benefit pr payment; (ii) the defendant failed to comply with those conditions; and (iii) the defendant falsely certified that it had complied with the conditions in order to induce the payment or benefit. *See United States ex rel. Harrison v. Westinghouse Savannah River Company*, 176 F.3d 776, 786 (4th Cir. 1999) and cases cited therein. Courts will not find FCA liability merely for non-compliance with a statute, regulation or contract clause. Liability for false certification will lie only if compliance with the statute, regulation or contract clause was a perquisite to the payment or benefit.

Some circuits recognize liability only if the defendant affirmatively—*i.e.*, expressly –certified such compliance; other courts have recognized liability based on an implied certification of compliance.

Express Certification

- ***Courts have accepted express false certification of compliance as a basis for FCA liability***

An express false certification claim is, as the term suggests, a claim that falsely certifies compliance with a particular statute, regulation or contractual term, where compliance is a prerequisite to payment. *United States ex rel Mikes v. Straus*, *supra,*

274 F.3d at 698. Many false claims cases involve express false certifications, and there seems to be no dispute that express false certifications violate the FCA. *See. e.g., United States ex rel. Harrison v. Westinghouse Savannah River Co. supra*; *United States ex rel. Thompson v. Columbia HCA*, 125 F.3d 899 (5th Cir. 1998). Courts generally have accepted express certification of compliance with a statute, regulation or contract clause as a basis for a false claim under the FCA. The statutory basis for liability can be either 31 U.S.C. §3729(a)(1), which addresses the submission of a false claim, or §3729(a)(2), which addresses a false record or statement to get a false claim paid.

To prove the elements of an express certification claim, the plaintiff must prove that:

- A statute, regulation or contract provision required some form of compliance;
- The defendant expressly certified compliance with the statute, regulation, or contract provision;
- The defendant failed to comply with the statute, regulation or contract provision;
- When the defendant expressly certified compliance, it knew that it had not complied with the statute, regulation or contract provision—*i.e.*, defendant acted knowingly within the meaning of §3729(b).
- Compliance with the statutory, regulatory or contractual provision was a prerequisite to payment.

In *United States ex rel. Harrison v. Westinghouse Savannah River Corp.*, 176 F.3d 776, 793 (4th Cir. 1999), the plaintiff alleged that the prime contractor falsely certified that it had no conflict of interest with a subcontractor so as to secure the government's approval of the subcontractor. The court said that mere non-compliance with a statute or regulation is not sufficient to create FCA liability. There can be liability for a false certification only if the government conditions compliance with the statute or regulation as a prerequisite for payment. *Id.* at 787.

The prerequisite standard in false certification cases is essentially a heightened materiality requirement: the government conditioned payment on certification of compliance, and the false certification had the natural tendency of causing the government to pay the claim. *Id.* at 793. The logic is analogous to a fraud-in-the-inducement theory of liability—*i.e.*, the false certification induced the government to pay the claim. In *Harrison*, the court said further that if the prime contractor knows that a material certification by a subcontractor is false, then as a matter of law the prime contractor has adopted the subcontractor's certification by submitting it to the government.

United States ex rel. Thompson v. Columbia/HCA Healthcare Co., supra, is another case illustrating the false certification theory of FCA liability based on express certification. Thompson alleged that as a condition of defendants' participation in the Medicare program the defendants were required to certify in annual cost reports that the services were provided in compliance with laws and regulations governing healthcare services. Thompson further alleged that the defendants falsely certified that the services identified in their annual cost reports were provided in compliance with such laws and regulations. The court held that the allegations stated a claim under FCA. The court acknowledged that violations of laws, rules or regulations alone do not create a cause of action under the FCA. However, false certifications of compliance create liability under the FCA when certification is a prerequisite to obtaining payment or other government benefit. *Id.* at 902.

► ***Proof of claim chart for express certification***

The following is a proof of claim chart for an FCA case based on an express certification theory of liability.

Element	Evidence
Statute, regulation or contract clause mandates compliance.	
Defendant expressly certified compliance with the statute, regulation, or contract provision.	
Defendant failed to comply with the statute, regulation or contract provision.	
When defendant certified compliance, it knew that it had not complied with the statute, regulation or contract provision.	
Compliance with the statute, regulation or contract clause was a prerequisite to payment.	

Implied Certification

► ***Many courts have also recognized FCA liability based on an implied certification of compliance, but only if compliance was a condition of payment***

An implied certification case is similar to an express certification case, except that the defendant has not signed an express certification of compliance with a statue,

regulation or contract clause. Rather, the defendant has simply submitted a claim. The theory of implied certification is that by submitting a claim, the contractor impliedly certifies that it has complied with all applicable statutes, regulations and contract clauses. According to the implied certification theory, if the defendant submits a claim knowing that the defendant has not complied with all laws, regulations and contract clauses, then the defendant has submitted by implication a false claim.

Many courts have recognized implied certification of compliance as a basis of FCA liability, but in general plaintiffs have had limited success invoking the theory in practice. The implied certification theory was applied successfully in *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994, *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995) (unpublished table decision). The Court of Federal Claims held that the defendants' submission of payment vouchers, although containing no express representation, implicitly certified their continued eligibility to participate in a federal small business program. Only eligible persons could participate in the program, and the defendants were not eligible. Nonetheless, they submitted claims for payment. The court held that by submitting claims for payment the defendants implicitly, but falsely, certified compliance with the eligibility requirements, resulting in FCA liability.

However, as shown by the cases below, caution should be exercised not to read this theory expansively and out of context. The *Ab-Tech* rationale, for example, fits comfortably only those regulations that are a precondition to payment–and one court has said that to construe the implied false certification theory in an expansive fashion would improperly broaden the FCA's reach. *United States ex rel Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001).

In *United States v. Siewick v. Jamieson Science and Engineering, Inc.*, 214 F.3d 1372 (D.C. Cir. 2000), the court recognized in principle the false certification theory, but rejected its application on the facts of that case. Jamieson Science and Engineering (JSE) had contracts with the government and submitted invoices for payment. The plaintiff alleged that Jamieson violated a criminal statute, 18 U.S.C. § 207, aimed at curbing "revolving door" abuses by government contractors and their employees. The plaintiff contended that Jamieson's invoices implicitly declared compliance with applicable law, including Section 207, and thus the invoices were impliedly false. The court rejected the contention stating:

> *[I]t is doomed by the rule, adopted by all courts of appeals to have addressed the matter, that false certification of compliance with a statute or regulation cannot serve as the basis for a qui tam action under the FCA* ***unless payment is conditioned on that certification.*** (Bold supplied.)
> *Id.* at 1375.

The court said that the plaintiff pointed to "nothing suggesting that JSE was required to certify compliance with § 207 as a condition of its contract." The court did not discuss what facts or evidence might "suggest" that compliance with Section 207 was a condition of payment. For example, would a clause in the contract referring to

compliance with Section 207 be sufficient to conclude that the contract conditioned payment on compliance? Would a reference to compliance with Section 207 in the Federal Acquisition Regulation be sufficient? The important lesson of *Jamieson* is that under implied certification, as with express certification, the court must conclude that compliance with the law, regulation, or contract clause is a condition of payment. In that respect the two certification theories are the same.

United States ex rel. Hopper v. Anton, 91 F.3d 1261 (9th Cir. 1996), *cert. denied*, 1997 U.S. LEXIS 798 (1997), is another case discussing the implied certification theory of FCA liability. The plaintiff, a public school teacher, alleged that her school district was not complying with the Individuals with Disabilities Education Act ("IDEA"). She alleged further that the school district violated the FCA when it filed annual reports of compliance with the IDEA. The court rejected the plaintiff's argument. The court said that the FCA "attaches liability, not to the underlying fraudulent activity, but to the claim for payment." *Id.* at 1266. In implied false certification cases, there are two major questions relating to liability: (1) whether the false statement is the cause of the government's providing the benefit; and (2) whether any relation exists between the subject matter of the false statement and the event triggering the government's loss. *Id.* Under the facts of the case, the school district's annual reports of compliance were not a triggering event, not a precondition to receipt of federal funds, and not a cause of a loss to the federal government. As the court stated:

> *Violations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false certification of compliance which creates liability when certification is a prerequisite to obtaining a government benefit. . . . Mere regulatory violations do not give rise to a viable FCA action. This is particularly true here where regulatory compliance was not a sine qua non of receipt of state funding.*
> *Id.* at 1266-67.

► *Elements for implied certification*

The elements of proving implied certification are the same as the elements for proving liability based on an express certification, but with one difference; the plaintiff must prove that by submitting a claim the defendant was impliedly certifying compliance with the statutory, regulatory or contractual provision at issue:

- The defendant submitted a claim;
- By submitting the claim, the defendant impliedly certified compliance with a statutory, regulatory, or contractual provision;
- The defendant failed to comply with the statutory, regulatory or contractual provision;

- When the defendant submitted its claim it knew that it had not complied with the statutory, regulatory or contractual provision—*i.e.*, defendant acted knowingly within the meaning of §3729(b).

- Compliance with the statutory, regulatory or contractual provision was a prerequisite to payment.

► ***Proof of claim chart for implied certification***

The following is a proof of claim chart for an FCA case based on an implied certification theory of liability.

Element	**Evidence**
Defendant submitted a claim.	
By submitting the claim, defendant impliedly certified compliance with the statute, regulation, or contract clause.	
Defendant failed to comply with the statute, regulation or contract clause.	
When defendant certified compliance, it knew that it had not complied with the statute, regulation or contract provision.	
Compliance with the statute, regulation or contract clause was a prerequisite to payment.	

Compliance as a prerequisite for payment

The plaintiff must prove that compliance with the statutory, regulatory or contractual provision was a prerequisite to payment. Under what circumstances is compliance a prerequisite for payment? This is a key question, but the court decisions say little about what facts or circumstances are sufficient to conclude that compliance is a condition of payment. Of course, the answer is obvious if the certification expressly states that compliance is a prerequisite for payment. But most certifications are not so explicit, and it is rare that a certification expressly states that compliance with a specific statute, regulation, or contract clause is a condition of payment.

The Department of Justice ("DOJ") takes the position that if there is a nexus between compliance and entitlement to payment, then compliance is a prerequisite to payment. This sounds good, but "nexus" is a slippery word and to state that there must be a nexus largely begs the question. What facts provide a sufficient nexus? Although

it would seem to implicate the rule against parol evidence, DOJ typically relies on the testimony of contracting and program officers that the government considered compliance to be a condition of payment, and if the government had known the truth about the contractor's noncompliance, then the government would not have paid the claim. In addition, DOJ also takes the position that the very existence of an express certification requirement is strong evidence that the agency considers compliance to be a prerequisite to payment.

Damages

False certification cases present issues of whether the government has incurred any damages and, if so, how to measure those damages. There is no set formula for measuring damages under the FCA, and damages can be measured in a variety of ways. *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 2003 WL 22989240 (4th Cir., Dec. 19, 2003). In *United States v. Killough*, 848 F.2d 1523, 1531-32 (11th Cir. 1988), the court cited the legislative history of the 1986 amendments stating that courts should remain free to fashion the measure of damages on a case-by-case basis so as to effectuate the remedial purposes of the FCA and to afford a full and complete recovery of all damages.

In some false certification cases, the evidence may show that the goods delivered did not conform to the specifications in the contract or in some other way were defective. In such cases, damages could be measured by the traditional benefit of the bargain measure of damages—that is, the difference in value between what was promised and what was delivered. In *Bornstein*, 423 U.S. at 316 n.13, the Court used market value to measure the damages. The Court said in a footnote that the government's damages are equal to the difference between the market value of the product received by the government and the market value of the product if it had been of the specified quality. The footnote in *Bornstein* is significant for two reasons. First, it approves the benefit of the bargain rule as a measure of damages in an FCA case. Second, by its citation to other cases that measure damages under a variety of theories, the Supreme Court in *Bornstein* endorsed the possibility of alternative measures and flexibility in assessing the government's damages under the FCA.

In *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296 (6th Cir. 1998), the court calculated the damages as the difference in value between what was promised and what was delivered. The contractor sold brake shoes to the Army, and falsely certified that it had tested the brake shoes in accordance with the contract, which it had not done. Later, the Army tested some of the brake shoes and found that 60% of those tested failed to meet the contract's requirements. The court said that the brake shoes did not come with the "quality assurance of a product that had been subjected to periodic production testing, and, consequently, the brake shoes had no value to the Army." *Id.* at 304. Thus, because the value of the goods received by the government was zero, the government was entitled to recover the full price of the brake shoes.

Some courts have applied a "but for" test for determining damages. In *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), the Court measured the damages as the amount that the government would not have paid had it known the true facts. Other courts have followed this approach. In *United States v. Woodbury*, 359 F.2d 370, 379 (9th Cir. 1966), the court said "the measure of the government's damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful." In a false certification case, the government can argue that the false certification induced (caused) the government to pay an amount that it never would have paid but for the false certification.

However, the "but for" test will not work in many false certification cases in which the false certification does not affect the quality of the product delivered by the contractor. For example, in *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429, 434-35 (1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995), the contractor used false statements to secure the award of an SBA contract under Section 8(a), but the contractor fully performed the contract. The court held that the government had incurred no actual damages and was limited to the recovery of penalties. Similarly, in *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 2003 WL 22989240 (4th Cir., Dec. 19, 2003), the court held that the prime contractor falsely certified that it had no conflict of interest with a subcontractor, but declined to award damages because the plaintiff failed to prove actual damages caused by the false certification. The plaintiff was limited to penalties under the FCA.

Many false certification cases concern falsified test data, both the failure to perform tests required by the contract and the falsification of data when tests were performed. In either case, the government's loss can be measured either (i) by the diminished value of the product as a result of the failure to test or to report test data accurately, or (ii) by the inflated cost of the untested or poorly tested product. The first measure of damages, *diminished value*, analogizes falsified test data cases to cases involving product substitution or defective parts. Under this measure, the government's damage is the difference between the value of the product specified in the contract, fully and successfully tested, and the diminished value of the product delivered. *See Bornstein*, 424 U.S. at 316 n.13. As in product substitution and defective product cases, there are times when the product delivered has no value to the government and, therefore, the government's damage is the full price paid for the contract. *See Midwest Specialties, Inc.,* 142 F.3d at 304; *Aerodex, Inc.*, 469 F.2d at 1011. The second measure of damages, *inflated cost*, covers the case in which the delivered product meets contract standards despite the contractor's failure to conduct the tests required under the contract—*i.e.* there is no diminution in value to the government because the product works as intended. Nevertheless, the government suffers a loss in that it paid for certain services—*i.e.* tests—that were not performed.

There are other strategies for measuring damages. In *United States v. West Coast Aluminum Heat Treating Co.*, 265 F.3d 986 (9th Cir. 2001), the contractor falsely certified that it properly heat-treated and tested aircraft parts. The parts were installed in aircraft, and it was difficult, if not impossible to trace them and to prove the diminished

value of the parts. The court used the contractor's profits as the measure of damages owed to the government. This measure of damages is useful when it is hard to prove the precise loss to the government from falsely certified non-conforming parts.

TRUTH IN NEGOTIATIONS ACT

10 U.S.C. § 2306a

Brief Overview

Congress historically has been concerned that the government not overpay for the goods and services that it purchases. Although market forces reduce the risk of excessive profits in the private sector, such forces often are not available to protect the government in its purchasing. For this reason, Congress enacted the Truth in Negotiations Act (TINA), 10 U.S.C. § 2306a, which is a comprehensive statute to ensure fair, reasonable and economic pricing in government contracts.

TINA requires persons negotiating contracts with the government to submit "cost or pricing data" supporting their proposals and to certify that the data is "accurate, complete, and current." TINA imposes a duty of disclosure. Failure to disclose accurate, complete, and current cost or pricing data, results in "defective pricing." Under TINA, a contractor is liable for defective pricing with or without knowledge that the data submitted were false, incomplete, or outdated. However, if knowledge is proven, then the contractor may also be liable under the False Claims Act, 31 U.S.C. § 3729, for treble damages and civil penalties. The two statutes overlap and reinforce the government's rights and remedies, by easing difficulties in proof arising under either statute.

TINA applies to many, but not all, contracts negotiated with the government. 10 U.S.C. § 2306a. TINA's principal requirement is that offerors, contractors, and subcontractors on government contracts submit cost or pricing data and certify that, to the best of their knowledge or belief, the cost or pricing data submitted are accurate, current and complete.

Elements

To establish a violation of 10 U.S.C. § 2306a, the government must prove five elements:

1) TINA applies to the contract or modification;

2) The information at issue is "cost or pricing data;"

3) The information at issue was reasonably available to the contractor before the agreement on price;

4) The information at issue was either not disclosed or not provided in a usable, understandable format to a proper government representative; and

5) The government relied upon the defective data in negotiating the contract price.

Element 1: TINA applies to the contract or modification

TINA applies to all executive branch agencies. Whether TINA applies to a contracting action depends on the dollar value of the contract, subcontract or modification. These dollar thresholds cannot be summarized briefly, and the statute must be consulted; but in general TINA applies to contracts and modifications exceeding $500,000. Always check the current statutory limits because these dollar thresholds are subject to periodic amendment.

TINA does not apply to contracts, subcontracts, or modifications falling into the following categories:

- awarded by sealed bid, 10 U.S.C. § 2306a(a)(1)(A);
- prime contracts and subcontracts for which the agreed upon price is based on "adequate price competition," 10 U.S.C. § 2306a(b)(1)(A)(i);
- prime or subcontracts for which the agreed upon price is based on prices set by law or regulation, 10 U.S.C. § 2306a(b)(1)(A)(ii);
- prime and subcontracts for which the agreed upon price is based on "established catalog or market prices of commercial items sold in substantial quantities to the general public," 10 U.S.C. § 2306a(b)(1)(B); and
- contracts or subcontracts comprising the "exceptional case" such that the head of the agency determines that the disclosure requirements may be waived and states in writing the reasons for his determination. 10 U.S.C. § 2306a(b)(1)(C).

See also FAR 15.403-1(b).

Element 2: The information at issue was "cost or pricing data"

The statutory definition of "cost or pricing data" is:

> *[T]he term "cost or pricing data" means all information that is verifiable and that, as of the date of agreement on the price of a contract (or the price of a contract modification) . . . a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.*

10 U.S.C. § 2306a(h)(1); FAR 2.101. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived." 10 U.S.C. 2306a(h)(1)(2004). This definition was adopted by Congress in 1987. *See* PUB. L. 100-180, 804(a), 101 Stat. 1125. The House report clarifies Congress' understanding of the definition:

> *The conferees acknowledge that . . . "cost or pricing data" must in some instances include information that would be considered judgmental. Although "cost or pricing data" do not indicate the accuracy of the contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. The factual data underlying judgments have been and should remain subject to disclosure.* ***Furthermore, "cost or pricing data" may include facts and data so intertwined with judgments that the judgments must be disclosed in order to make the facts or data meaningful. . . .*** (bold supplied)
> H.R. REP. NO. 466, 100th Cong. 1st Sess. 657 (1987).

The primary controversy in this definition concerns the issue of "judgment" versus "verifiable fact." The legislative comments suggest that "verifiable facts" should be "broadly construed to include all facts that a prudent buyer or seller would reasonably expect to affect price negotiations significantly." H.R. REP. NO. 466, at 657 (1987).

The determination of whether or not information is "cost or pricing data" is a question of fact and is made on a case-by-case basis. *E-Systems, Inc.*, 74-2 BCA ¶ 10,782 (ASBCA), *aff'd*, 74-2 BCA 10,943 (1974). The test for determining what is cost or pricing data is an objective one, in other words whether the hypothetically reasonable person would expect the data to affect significantly price negotiations. *Plessy Indus., Inc.*, 74-1 BCA ¶ 10,603 (ASBCA 1974). It appears that "facts" are not restricted to historical costs, but it is not clear how much judgmental information mixed with fact must be disclosed. *See Millipore Corp.*, 91-1 BCA ¶ 23,345 (GSA 1990) (deciding that cost and pricing data includes management decisions which might reasonably be expected to have a bearing on price).

FAR 2.101 provides that "cost or pricing data" are more than historical accounting data; they are all facts that can be reasonably expected to contribute to the soundness of estimates of future costs and the validity of determinations of costs already incurred. They also include such factors as:

(1) vendor quotations;

(2) nonrecurring costs;

(3) information about changes in production or purchasing volume;

(4) data supporting projections of business prospects and objectives and related operations costs;

(5) unit-cost trends such as those associated with labor efficiency;

(6) make-or-buy decisions;

(7) estimated resources to attain business goals; and

(8) information on management decisions that could have a significant bearing on costs.

Element 3: The data was reasonably available to the contractor

Contractors are required only to disclose cost or pricing data that are reasonably available at the time of certification. Often contractors argue that that information is not reasonably available because of the urgency of the negotiations and the negotiators lack of actual knowledge of undisclosed data. Rarely has this argument been effective.

Urgency of the negotiations will not relieve the contractor of potential TINA liability. The contractor should not respond to a solicitation if the contractor feels there was not adequate time to respond accurately. *See Baldwin Elec., Inc.*, 76-2 BCA ¶ 12,199 (ASBCA 1976) (deciding that six-day return date for proposal from contractor did not prevent TINA liability). However, if the government requires a contractor to provide complete and current cost or pricing data at the time of price negotiation and certification, the government must allow the contractor reasonable time to prepare the information. *LTV Electrosystems*, 73-1 BCA ¶ 9,957 (ASBCA 1973).

The argument that the contractor's negotiators lacked knowledge of the cost or pricing data is generally not sufficient to relieve TINA liability. In *Sylvania Elec. Prod.*, the contractor argued that the information was not reasonably available to its negotiators; however, the contractor admitted that the information was known by one branch of the contractor's company. *Sylvania Elec. Prod. v. United States*, 202 Ct. Cl. 16, 479 F.2d 1342, 1349 (1973). The court did not sympathize with the contractor, finding it "ludicrous" that it took the contractor's negotiators between thirty and thirty-seven days to learn information that could have been relayed in a phone call. *Id.*

Element 4: The contractor failed adequately to disclose the data

The contractor has an affirmative duty not only to provide the government with accurate, complete, and current cost or pricing data, but also to disclose the significance of the data in a meaningful way.

Contractors have tried to defend against this element by saying that the government was given access to the contractor's files and had the government looked more closely, the information would have been discovered. This is not enough. The

contractor must advise the government's representative of the "kind and content" of all relevant cost or pricing data. *Sylvania Elec. Prod., Inc.*, 70-2 BCA ¶ 8,387, 38,999 (ASBCA 1970).

TINA does not impose on the contractor a particular accounting method specified by the government, but the contractor must provide the government with the best information in the contractor's possession. *Hughes Aircraft Co.*, 90-2 BCA ¶ 22,847 (ASBCA 1990). The contractor does not have to analyze the data, but must submit it in a form that reveals the significance of the data and is conducive to the government's analysis. *Hughes Aircraft Co.*, 90-2 BCA ¶ 22,847 (ASBCA 1990). Generally, whether a contractor adequately disclosed the data is determined on a case-by-case basis using the "rule of reason." *General Dynamics Corp.*, 93-1 BCA ¶ 25,378 (ASBCA 1992); *Whittaker Corp.*, 74-2 BCA ¶ 10.938 (ASBCA 1974).

Element 5: The government relied on the defective data

The government must show that it relied upon the defective data, and, had the government been aware that the data was defective, then the Government would have negotiated a lower price. *See, e.g., Conrac Corp.*, 74-1 BCA ¶ 10,605 (ASBCA 1974). Thus, there may be cases in which a contractor can escape liability by proving that the government (i) considered the defective data irrelevant and (ii) would not have reviewed additional data had it known of the undisclosed information. *See Muncie Gear Works, Inc.*, 75-2 BCA ¶ 11,380 (ASBCA 1975); *Sparton Corp.*, 67-2 BCA ¶ 6,539 (ASBCA 1967).

The existence of defective data creates a rebuttable presumption that the government relied on the data. *Sylvania Elec. Prod. v. United States*, 202 Ct. Cl. 16, 479 F.2d 1342, 1349 (1973); *Aerojet-General Corp.*, 69-1 BCA ¶ 7,664 (ASBCA 1969), 70-1 BCA ¶ 8,140 (1970). To rebut the presumption, the contractor must show that the contracting officer did not rely on the defective data and would not have relied on accurate, complete, and current data had it been provided. *In re Bicoastal Corp.*, 124 B.R. 598 (Bankr. M.D. Fla. 1991); *Baldwin Elec., Inc.*, 76-2 BCA ¶ 12,199 (ASBCA 1976); *Hardie-Tynes Mfg. Co.*, 76-2 BCA ¶ 12,121 (ASBCA 1976); *see also Conrac Corp.*, 78-1 BCA ¶ 12,985 (ASBCA 1977) (holding reliance must be reasonable); *Sparton Corp.*, 67-2 BCA ¶ 6,539 (ASBCA 1967).

Prohibited Defenses

Section 2306a(e)(3) of TINA prohibits certain defenses:

It is not a defense to an adjustment of the price of a contract.....that

(A) the price of the contract would not have been modified, even if accurate, complete and current cost or pricing data had been submitted...because the contractor or subcontractor was the sole source or was otherwise in a superior bargaining position....

(B) the contracting officer should have known that the cost and pricing data...were defective even though the contractor or subcontractor took no action to bring the...data to the attention of the contracting officer...

(C) the contract was based upon an agreement...about the total cost of the contract and...no[t]...about the cost of each item procured....

(D) the prime contractor or subcontractor did not submit a certification of current cost and pricing data relating to the contract as required...

Damages

In order to establish damages, the government must prove that it relied on the defective data, or, stated another way, that the price of the agreed-to price would have been lower, had the government been given the non-disclosed information. *See United States ex rel. Campbell v. Lockheed Martin Corp.*, 282 F. Supp. 2d at 1332; *United States v. United Tech. Corp., Sikorsky Aircraft Div.*, 51 F. Supp. 2d 167, 189 (D.Conn. 1999). Under defective pricing case law, there is a rebuttable presumption that the price of a contract was inflated by the amount of the non-disclosed data. *United States ex rel. Campbell v. Lockheed Martin Corp.,* 282 F. Supp. 2d at 1332 (holding there is a presumption that undisclosed information, if disclosed, would have resulted in a dollar-for-dollar lowering of the contract price, and once the government establishes nondisclosure of cost or pricing data, the burden shifts to the contractor to prove that the Government did not rely on the defective data); *Sylvania Electric Products, Inc.*, 479 F.2d 1342, 1349 (1973) (holding the same).

The Armed Services Board of Contract Appeals has held that "the natural and probable consequence" of the existence of defective data results in "dollar for dollar" damage to the United States. *E.g., General Dynamics Corp.*, 1993 ASBCA LEXIS 321 (ASBCA Aug. 24, 1993); *American Bosch Arma Corp.*, 65-2 BCA ¶ 5,280 (ASBCA 1965).

The dollar-for-dollar natural and probable consequences rule is a rebuttable presumption. *See Sylvania Elec. Prod., Inc.*, 479 F.2d 1342; *S.T. Research Corp.*, 84-3 BCA ¶ 17,568 (ASBCA 1984). Recent cases have allowed contractors to reduce the amount of the Government's damages upon a specific showing that negotiations removed the excessive price the data might have caused. *See Grumman Aerospace Corp.*, 90-2 BCA ¶ 22,842 (ASBCA 1990); *Sperry Corp. Computer Sys., Defense Sys. Div.*, 88-3 BCA ¶ 20,975 (ASBCA 1988).

The fact that the contractor suffered a loss on the contract does not rebut the presumption that the Government has been harmed. *Hardie-Tynes Mfg. Co.*, 76-1 BCA ¶ 11,827 (ASBCA 1976). For a more complex and comprehensive discussion of the computation of damages in a TINA action, see Defense Contract Audit Agency, U.S. Department of Defense, 2 *DCAA Contract Audit Manual*, Ch. 14 (July 2003).

Proof Chart for TINA

Element	Synopsis of Evidence
TINA applies to the contract or modification.	
The information at issue is cost or pricing data.	
The information was reasonably available to the contractor.	
The contractor did not adequately disclose the information.	
The government relied on the defective data.	

False Claims Act

As mentioned above, a TINA violation may also be prosecuted as a violation of the False Claims Act, 31 U.S.C. § 3729, if the contractor acted "knowingly." A knowing failure to disclose cost and pricing data may form the basis of an action under the False Claims Act. *See United States v. White*, 765 F.2d 1469, 1479-80 (11th Cir. 1985) (addressing criminal False Claims Act); *United States v. Foster Wheeler Corp.*, 447 F.2d 100, 101 (2d Cir. 1971) (addressing civil False Claims Act and explaining that TINA neither preempts nor is incompatible with the False Claims Act); *United States ex rel. Campbell v. Lockheed Martin Corp.*, 282 F. Supp.2d 1324, 1332 (M.D. Fla. 2003). The advantage of the False Claims Act is that it entitles the government to treble damages and civil penalties, and the advantage of TINA is that it does not require proof of intent.

The elements of an action under the False Claims Act (based on TINA) are the same as the elements for TINA, except that the government must prove that the defendant acted knowingly as that term is defined in the False Claims Act, 31 U.S.C. § 3729(b):

Element 1 TINA applies to the contract or modification.

Element 2 The information at issue is cost or pricing data.

Element 3 The information was reasonably available to the contractor.

Element 4 The contractor did not adequately disclose the information.

Element 5 The government relied on the defective data.

Element 6 The contractor acted knowingly as defined by the False Claims Act, 31 U.S.C. § 3729(b).

Proof Chart for False Claims Act action based on TINA violation

Element	Synopsis of Evidence
TINA applies to the contract or modification.	
The information at issue is cost or pricing data.	
The information was reasonably available to the contractor.	
The contractor did not adequately disclose the information.	
The government relied on the defective data.	
The contractor acted knowingly.	

ANTI-KICKBACK ACT OF 1986

41 U.S.C. § 51 *et seq.*

"In the idiom of economic crime, a kickback is a kind of commercial bribe. 'Typically, they are payments made by one business to employees of another in order to induce favorable commercial treatment from [the employees'] company.'" *United States v. Purdy*, 144 F.3d 241, 242 (2d Cir. 1998), quoting H.R. REP. NO. 99-964, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5960, 5962.

Kickbacks are damaging to the government because the natural result of paying kickbacks is the inflation of charges to the government in order to make the scheme profitable for the payer of the kickbacks. *United States v. Acme Process Equip. Co.*, 385 U.S. 138, 143-45 (1966); *United States v. Gamma Tech Indus., Inc.*, 265 F.3d 917, 928 (9th Cir. 2001); *United States v. Vaghela*, 169 F.3d 729, 736 (11th Cir. 1999).

The Anti-Kickback Act of 1986 modernized and closed loopholes in previous statutes applying to government contractors. The 1986 law makes the anti-kickback statute a more useful prosecutorial tool by expanding the definition of prohibited conduct and by making the statute applicable to a broader range of persons involved in government subcontracting. However, the 1986 amendments arguably made it more difficult to convict a person of violating the Anti-Kickback Act, because the amendments changed the *scienter* standard from "knowingly" to "knowingly and willfully," thereby increasing the level of criminal intent that the government must prove to sustain a conviction. *United States v. Burger*, U.S. Dist. 2000 LEXIS 22066, at 19 n.4 (N.D. Cal. 2000).

The following discusses the statute's key provisions and relevant case law, sets forth the elements of a prosecution and of civil causes of action under the statute, and discusses other sections of the law providing for administrative offsets and contractor responsibilities.

Key Provisions

Section 52(2) - "Kickback" defined

The term "kickback" means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

There are several points to note about this definition:

- The definition broadly encompasses any and all compensation and

things of value and is presumably broad enough to cover services and favors in the nature of services. Virtually anything that is a quid pro quo for obtaining or receiving favorable treatment on a contract should be within the ambit of the statute. For example, in Howard v. United States, 345 F.2d 126 (1st Cir. 1965), the subcontractor furnished labor and materials for the private home of the prime contractor's general manager. In United States v. Kruse, 101 F. Supp. 2d 410 (E.D. Va., 2000), the subcontractor provided interest-free loans to an officer of the prime contractor.

- The kickback must be for the purpose of obtaining or rewarding favorable treatment on a contract. There must be some nexus between the kickback and the awarding or the performing of the contract. However, the government need not prove that the defendant specifically intended to defraud the government or acted with the specific purpose of obtaining favorable treatment on a government contract. Kickbacks "made at any point in the government procurement process for the purpose of improperly obtaining favorable treatment are prohibited by the Act, regardless of whether or not the offender knew of the government's involvement." United States v. Purdy, 144 F.3d 241, 245 (2d Cir. 1998).

- The purpose of the kickback must be "improper," and the defendant must have fair notice that his conduct is improper. In Burger, 2000 U.S. Dist. LEXIS 22066, the court held that applicable regulations and policies of HUD did not give the manager of a federally subsidized housing project fair notice that his fee splitting arrangement with the owners of the project was an improper kickback.

- The current statute covers prime contractors and employees of prime contractors. This was not always the case. Until the 1986 amendments, the statute provided civil and criminal penalties only against subcontractors and recipients of kickbacks, but not against prime contractors. United States v. General Dynamics Corp., 19 F.3d 770, 772 n.3 (2d Cir. 1994). In 1986 the Anti-Kickback Act was substantially revised and now covers kickbacks paid to prime contractors and their employees. The statute provides a civil remedy directly against a prime contractor "whose employee, subcontractor, or subcontractor employee violates section 53 of [title 41] by providing, accepting, or charging a kickback." 41 U.S.C. § 55(a)(2) (2000).

Section 52(4) - "Prime contract" defined[8]

The term "prime contract" means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.

This definition covers all types of contracts: non-negotiated contracts as well as negotiated contracts, firm-fixed price contracts, and cost reimbursable contracts.

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[8] The statute has an analogous definition of "subcontract": "The term 'subcontract' means a contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract." 41 U.S.C. § 52(7) (2000).

In the typical case, the supplies, materials, equipment or services are either directly or indirectly for the federal government, but this need not be the case. The statue does not require that the supplies or services be for the federal government. Contracts providing goods and services to the public may also be prime contracts within the meaning of the statute, provided there is some nexus with the federal government, *Burger*, 2000 U.S. Dist. LEXIS 22066, at 11, and thus the statute covers more than federal procurement contracts per se. It covers, for example, federal assistance contracts of the type at issue in *Burger*.

Section 53 - Prohibited conduct

> *It is prohibited for any person—*
>
> *(1) to provide, attempt to provide, or offer to provide any kickback;*
>
> *(2) to solicit, accept, or attempt to accept any kickback; or*
>
> *(3) to include, directly or indirectly, the amount of any kickback prohibited by clause (1) or (2) in the contract price charged by a subcontractor to a prime contractor or a higher tier subcontractor or in the contract price charged by a prime contractor to the United States.*

Section 53 prohibits three types of acts:

Clause (1) prohibits a person from paying or attempting to pay a kickback and applies to the person who pays the kickback.

Clause (2) prohibits a person from receiving a kickback and applies to the recipient of the kickback payment.

Clause (3) prohibits including the amount of the kickback in the contract price charged either to the United States, to a prime contractor, or to a higher tier subcontractor. Thus, depending on the circumstances, clause (3) could apply to the person paying the kickback or to the person receiving the kickback or to both the payer and the recipient. As noted above, there is an assumption that the natural result of paying kickbacks is the inflation of charges to the government in order to make the scheme profitable for the payer of the kickbacks. *Gamma Tech Indus., Inc.*, 265 F.3d at 928; *Vaghela*, 169 F.3d at 736.

Section 54 - Criminal penalties

> *Any person who knowingly and willfully engages in conduct prohibited by section 53 of this title shall be imprisoned for not more than 10 years or shall be subject to a fine in accordance with title 18, or both.*

The important feature of this section is that it requires the government to prove that that the defendant acted knowingly and willfully. The word "willfully" was added in the 1986 amendments. The principal issue is what must the government prove to satisfy the requirement that the defendant acted willfully.[9]

It has been said that the word "willfully" has many meanings whose construction is often dependent on the context in which it appears. *Spies v. United States*, 317 U.S. 492 (1943). The word obviously differentiates between deliberate and unwitting conduct, but in criminal law it also typically refers to a culpable state of mind. *Bryan v. United States,* 514 U.S. 184, 191-92 (1998). As explained in *United States v. Murdock*, 290 U.S. 389, 394-95 (1933), the word often denotes an act, which is intentional, or knowing, or voluntary, as distinguished from accidental, but when used in a criminal statute it generally means an act done with a bad purpose. *Bryan*, 514 U.S. at 191 n.12. To prove a willful violation of a statute, the government must prove that the defendant acted with knowledge that his conduct was unlawful, not simply that he did a knowing, intentional or voluntary act. *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994). In *Bryan*, a case decided under the federal firearms laws, the Court said that to prove willful conduct the government need not prove that the defendant had knowledge of the specific law that he was charged with violating. It was sufficient if the government proved that the defendant understood generally that his conduct was unlawful.

As of this writing, there are no reported cases discussing the meaning of "willfully" as used in the current version of the statute. There are cases discussing the meaning of that term in the analogous Medicaid-Medicare Anti-Kickback statute, 42 U.S.C. § 1320a-7b(b) (2000), whose language is similar to the Anti-Kickback Act applicable to government contracting. Courts construing the Medicaid-Medicare statute have reached different conclusions as to the meaning of "willfully." Some have determined that "willfully" requires that the offender have acted with knowledge that his conduct was unlawful. *See Hanlester Network v. Shalala*, 51 F.3d 1390, 1400 (9th Cir. 1995) (requiring proof that defendants specifically intended to violate the anti-kickback statute); *United States v. Davis*, 132 F.3d 1092, 1094 (5th Cir. 1998) (same); *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 33 (1st Cir. 1989) (same). Other courts have held that the prosecution must prove that the defendant had a generally bad intent to disobey or disregard the law. *United States v. Stark*, 157 F.3d 833, 839 (11th Cir. 1998). Finally, some courts have concluded that the term requires only that the offender have acted with knowledge that his conduct was wrongful. *United States v. Jain*, 93 F.3d 436, 441 (8th Cir. 1996), *cert. denied*, 520 U.S. 1273 (1997); *United States v. Neufeld*, 908 F. Supp. 491, 496 (S.D. Ohio 1995).

It is likely that courts construing the meaning of "willfully" in 41 U.S.C. § 54 will disagree on the meaning of the term. Some courts will require the government to prove

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[9] *Howard v. United States*, 345 F.2d 126 (1st Cir. 1965), discussed the meaning of "knowingly," in the pre-1986 version of Section 54 and held that the government need not prove that the defendant acted with specific intent to defraud. *Howard* is a dangerous precedent because before 1986 Section 54 required the government to prove only that the defendant acted knowingly, not willfully. Under the current statute, the government must prove that the defendant acted "willfully."

that the defendant knew that his conduct was unlawful, and others will require the government to prove only that the defendant knew that his conduct was wrongful, but not illegal.

Section 55 - Civil actions

> *(a) (1) The United States may, in a civil action, recover a civil penalty from any person who knowingly engages in conduct prohibited by section 53 of this title. The amount of such civil penalty shall be -*
>
> *(A) twice the amount of each kickback involved in the violation; and*
>
> *(B) not more than $10,000 for each occurrence of prohibited conduct.*
>
> *(2) The United States may, in a civil action, recover a civil penalty from any person whose employee, subcontractor or subcontractor employee violates section 53 of this title by providing, accepting, or charging a kickback. The amount of such civil penalty shall be the amount of that kickback.*

Section 55 gives the United States two similar, but nonetheless distinct, civil causes of action.

Subsection 55(a)(1) This subsection provides that the United States may file a civil action to recover a civil penalty from any person who "knowingly" violates Section 53. The amount of the penalty is twice the amount of each kickback, plus an added penalty of up to $10,000 for each occurrence of prohibited conduct.

Unlike Section 54, which makes it a crime to violate Section 53 of the statute, and which requires that the government prove that the defendant acted both knowingly and willfully, Subsection 55(a)(1) requires that the government prove only that the defendant acted knowingly, not willfully. The statute does not define "knowingly." Generally, the term "knowingly" means that the government must prove that the defendant had knowledge of the facts that constitute a violation, but not that the defendant knew that he was breaking the law. *Bryan*, 514 U.S. at 193. "Knowingly" does not necessarily have reference to a culpable state of mind or to knowledge of the law, *United States v. Bailey*, 444 U.S. 394 (1980), and thus to prove a cause of action under Subsection 55(a)(1) the government need not prove that the defendant intended to break the law.

Of course, the government must still prove that there was a kickback as defined at § 52(2). As discussed above, the government must prove that the defendant knew that the payment was made for the "purpose of improperly obtaining or rewarding favorable treatment" on a contract.

Subsection 55(a)(2) This subsection provides that the United States can sue to recover a civil penalty from any person whose employee, subcontractor, or subcontractor

employee violates Section 53 by providing, accepting or charging a kickback. In an action under Subsection 55(a)(2), the amount of the civil penalty is limited to the amount of the kickback. What is noteworthy is that this subsection does not require the government to prove that the employee or subcontractor acted knowingly when providing, accepting or charging the kickback. Subsection 55(a)(2) creates a strict liability violation, *United States v. Lippert*, 148 F.3d 974, 977 (8th Cir. 1998), and for that reason it is easier for the government to prove a violation of this subsection than of Subsection 55(a)(1). Usually, the complaint will allege in the alternative violations of both Subsections 55(a)(1) and (2).

No double jeopardy In cases in which a defendant has been convicted of violating Section 54, the Double Jeopardy Clause does not preclude the imposition of civil penalties in a collateral civil action pursuant to Section 55(a)(1). *Lippert*, 148 F.3d 974.

Excessive fines The amount of the penalty may be subject to judicial scrutiny under the Excessive Fines Clause. *Lippert,* 148 F.3d 974, held that a penalty equal to two times the amount of the kickback was held not excessive. However, *Kruse*, 101 F. Supp. 2d 410, held that imposition of a $10,000 penalty per violation was impermissible punishment and violated the Excessive Fines Clause. As a general proposition, whether a penalty is excessive will be decided on the facts case-by-case.

Cancellation of contracts In addition to money damages, if a contractor, or its employees, violates the Anti-Kickback Act, then the government can exercise the contractual remedy of canceling the contract. In *Acme Process Equip. Co.*, 385 U.S. 138, a unanimous Supreme Court ruled that the United States could rightfully cancel its contract with Acme, a prime contractor, because three of Acme's principal employees had accepted kickbacks for awarding related subcontracts in violation of the Anti-Kickback Act. Although *Acme* was decided before the 1986 amendments, its reasoning should apply with equal force to cases decided under the current law.

No preemption of the False Claims Act The Anti-Kickback Act does not preempt a cause of action under the False Claims Act, 31 U.S.C. § 3729(a) (2000). *General Dynamics Corp.*, 19 F.3d 770. The government can sue under either or both statutes. Moreover, the Second Circuit has stated that the remedies under the False Claims Act and federal common law are not limited to the amount of the kickbacks, but extend to consequential damages resulting from the payment of kickbacks. *Id.* at 773. This statement is significant because some courts have held that consequential damages are unavailable under the False Claims Act. *See, e.g., United States v. Aerodex, Inc.*, 469 F.2d 1003, 1011 (5th Cir. 1972)

Section 56 - Administrative offsets

The Anti-Kickback Act provides that that the contracting officer may offset the amount of the kickback against money owed by the United States to the prime contractor under the prime contract to which the kickback relates.

It further provides that if the amount of the kickback is offset against money owed on a prime contract, then upon direction of the contracting officer, the prime contractor shall withhold money owed to a subcontractor under a subcontract of the primer contract. The contracting officer may order that the amount withheld be paid to the contracting agency or be retained by the prime contractor.

Section 57 - Contractor responsibilities

The Anti-Kickback Act requires contracting agencies to include clauses in prime contracts requiring contractors to (i) have in place and follow procedures to prevent and detect kickbacks; (ii) cooperate fully with federal investigations; and (iii) report suspected violations to the government.

Elements of a crime in violation of Section 54

To prove a violation of 41 U.S.C. § 54, the government must prove four elements:

1) Prohibited conduct—The defendant violated Section 53 by paying or receiving a kickback or by including the amount of a kickback in the contract price.

2) A "kickback" within the statutory definition—The defendant provided something of value to a prime contractor, prime contractor's employee, subcontractor, or subcontractor's employee.

3) Purpose of kickback—The purpose was to improperly obtain or reward favorable treatment in connection with a government contract.

4) *Scienter*—The defendant acted knowingly and willfully.

Proof Chart

Element	Synopsis of Evidence
Defendant paid or receive a kickback or included amount of kickback in contract price.	
Defendant provided something of value to a prime contractor, subcontractor, or employee thereof.	
Defendant acted for purpose of obtaining or	

rewarding favorable treatment in connection with a contract.	
Defendant acted knowingly and willfully.	

Elements of a civil cause of action under Section 55(a)(1)

To prove a cause of action under 41 U.S.C. § 55(a)(1), the government must prove four elements:

1) Prohibited conduct—The defendant violated Section 53 by paying or receiving a kickback or by including the amount of a kickback in the contract price.

2) A "kickback" within the statutory definition—The defendant provided something of value to a prime contractor, prime contractor's employee, subcontractor, or subcontractor's employee.

3) Purpose of kickback—The purpose was to improperly obtain or reward favorable treatment in connection with a government contract.

4) Knowledge—The defendant acted knowingly.

Proof Chart

Element	Synopsis of Evidence
Defendant paid or received kickback or included amount of kickback in contract price.	
Defendant provided something of value to a prime contractor, subcontractor, or employee thereof.	
Defendant acted for purpose of obtaining or rewarding favorable treatment in connection with a contract.	
Defendant acted knowingly.	

Elements of a civil cause of action under Section 55(a)(2)

To prove a cause of action under 41 U.S.C. § 55(a)(2), the government must prove three elements:

1) Prohibited conduct—The defendant violated Section 53 by paying or receiving a kickback or by including the amount of a kickback in the contract price.

2) A "kickback" within the statutory definition—The defendant provided something of value to a prime contractor, prime contractor's employee, subcontractor, or subcontractor's employee.

3) Purpose of kickback—The purpose was to improperly obtain or reward favorable treatment in connection with a government contract.

Proof Chart

Element	Synopsis of Evidence
Defendant paid or received a kickback or included amount of kickback in contract price.	
Defendant provided something of value to a prime contractor, subcontractor, or employee thereof.	
Defendant acted for purpose of obtaining or rewarding favorable treatment in connection with a contract.	

Sample allegation of a civil cause of action under Section 55

¶ Paragraphs [XX] of this complaint are hereby realleged and incorporated as though set forth in full herein.

¶ This is a claim against [defendant] under the Anti-Kickback Act, 41 U.S.C. § 51 *et seq.*

¶ The arrangements described above were established "for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime

contract or in connection with a subcontract relating to a prime contract," 41 U.S.C. § 52(2), and thus constituted illegal kickbacks in violation of 41 U.S.C. § 53, as well as in violation of [defendant's] contracts with the Air Force.

¶ By reason of the conduct alleged herein, [defendant] knowingly engaged in conduct prohibited by 41 U.S.C. § 53 with respect to kickbacks paid to and/or by [XXX] and others.

¶ By reason of the conduct alleged herein, [defendant] knowingly caused, directly or indirectly, the kickbacks to be included in the charges to the United States, in violation of 41 U.S.C. § 53(3).

¶ Pursuant to section 55(a)(1), the United States is entitled to recover from [defendant] double the amount of the kickbacks, plus $10,000 per kickback.

¶ In the alternative, pursuant to section 55(a)(2), the United States is entitled to recover the amount of the kickbacks from [defendant].

BRIBERY AND ILLEGAL GRATUITIES

18 U.S.C. § 201

Introduction

Congress first passed a statute criminalizing bribery in 1853. The statute's primary purpose was to prevent misuse of federal funds by persons held in public trust and prevent fraudulent claims against the United States. But, it also included a general provision prohibiting bribery of members of Congress and other federal officials. *See* Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 171. As the federal government expanded and assumed new roles, the federal bribery statutes expanded and eventually grew into nine separate sections covering various different federal officials. In 1948 the statutes expanded further to include explicitly "employees" of the federal government. *See* Act of June 25, 1948, ch. 645, § 201, 62 Stat. 691. Federal case law already held employees could be prosecuted under the bribery statute. *See, e.g., United States v. Birdsall*, 233 U.S. 223, 230-231 (1914). In 1962 Congress reorganized the bribery statute into its present form. A single comprehensive section replaced the many existing sections concerning bribery. Act of Oct. 23, 1962, PUB. L. 87-849, 76 Stat. 119. The reorganization was not intended to make significant changes in the substance or the broad scope of the bribery statutes as previously construed by the courts. S. REP. NO. 2213, 87th Cong., 2d Sess.

The purpose of the statute is to protect the public from corruption of public officials and the consequences that follow. *Continental Mgmt., Inc. v. United States*, 527 F.2d 613 (Ct. Cl.1975). It discourages attempts to gain an advantage by influencing public officials. *United States v. Jacob*, 431 F.2d 754 (2d Cir. 1970). It prevents compensation in return for special favors, *United States v. Pommerening*, 500 F.2d 92 (10th Cir. 1974), and it prevents illicit compensation for an official act completed or about to be completed. *United States v. Irwin*, 354 F.2d 192 (2d Cir. 1965).

The present bribery statute, Section 201 of Title 18, is divided into five subsections. This Fraud Remedies Bulletin will discuss pertinent provisions of the first three subsections.

The *first subsection* sets forth definitions for "public official," "person who has been selected to be a public official" and "official act."

The *second subsection* describes the first of two distinct offenses encompassed by § 201. Subsection (b) of § 201 describes what is commonly considered "bribery." It is further divided to cover the acts of giving and receiving a bribe. Subsection (b)(1) prohibits corruptly giving, offering, or promising something of value to a public official to influence any official act or to induce an omission or violation of a lawful duty. It applies to the person who gives or offers the bribe. Subsection (b)(2) prohibits a public official from corruptly demanding, seeking, receiving, accepting, or agreeing to receive or accept something of value in return for "being influenced in the performance of any official act." It applies to the public official who receives or demands the bribe.

Subsections (b)(3) and (b)(4) encompass giving or accepting anything of value intended to influence witness testimony.

Within §201(c)(1) of the *third subsection* is an offense more commonly considered "illegal gratuities." Like §201(b), it is also further divided. Section 201(c)(1)(A) forbids something of value being given, offered, or promised to a public official "for or because of any official act." Similarly, § 201(c)(1)(B) forbids a public official from demanding, seeking, receiving, accepting, or agreeing to be receive or accept anything of value "for or because of any official act." The remaining subsections proscribe giving or receiving anything of value for or because of testimony.

Comparison of Bribery and Illegal Gratuities

The chart below compares the language that prohibits receiving a bribe with the language that prohibits receiving an illegal gratuity and shows some immediate similarities and differences. (The language prohibiting giving a bribe or giving an illegal gratuity has the same similarities and differences, but is not shown in a separate chart.) Differences in the language are italicized for clarity.

§ 201(b)(2) – Accepting a bribe	**201(c)(1)(B) – Accepting a gratuity**
Whoever, being a public official or person selected to be a public official,	Whoever, being a public official, *former public official*, or person selected to be a public official
directly or indirectly,	directly or indirectly,
Corruptly	*otherwise than as provided by law for the proper discharge of official duty,*
demands, seeks, receives, accepts, or agrees to receive or accept	demands, seeks, receives, accepts, or agrees to receive or accept
anything of value	anything of value
Personally *or for any other person or entity*	Personally
With intent to: (A) influence the performance of any official act; (B) influence a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the U.S.; or (C) induce a public official to do or omit to do any act in violation of the official duty of such official	*for or because* of any official act performed or to be performed by such official or person

After comparing the language of each section, some differences are readily noticeable. The bribery section is broader than the illegal gratuities section with regard to who benefits from receiving a thing of value. The bribery section prohibits receiving

anything of value "personally or for any other person or entity." The gratuity section only forbids receiving anything of value "personally."

Bribery and gratuity also differ on the requisite intent. The bribery section requires the bribe to be accepted "corruptly" and "with intent to influence" the official or an official act. The gratuity section prohibits accepting anything of value when it is "otherwise than as provided by law for the proper discharge of official duty," which is a lesser degree of criminal intent than for bribery.

The bribery statute prohibits accepting a thing of value "in return for: (1) being influenced in his performance of any official act," whereas the gratuity section prohibits receiving anything of value "for or because of any official act performed or to be performed by such official or person." Based on the words "in return for being influenced," the bribery section applies to future acts. In contrast, the gratuity section applies to past and future official acts because it refers to "any official act performed or to be performed."

Elements

Notwithstanding these differences, the comparison shows that the statutes for bribery and illegal gratuities generally require proving the same following basic elements:

Element 1: Public official

- Bribery involves a "public official or person selected to be a public official."
- The offense of illegal gratuities is broader. It reaches not only a "public official or person selected to be a public official" but also "former public officials."

Element 2: Thing of value

Element 3: Request or receipt by the official, or an offer or promise to the official of a thing of value

Element 4: Thing of value benefits the official or some other person or entity

- Bribery can benefit the official personally or "any other person or entity."
- An illegal gratuity is only for the benefit of the official.
- Legitimate campaign contributions to public officials or their campaign committees do not violate the bribery statute because there is no "quid pro quo," or the giving of money in exchange for a specific official act. Legitimate campaign contributions also do not violate the illegal gratuities statute unless it can be proven that the contribution personally benefited the public official. *United States v. Brewster*, 506 F.2d 62, 77 (D.C. Cir. 1974).

Element 5: Requisite connection to an official act

- If the thing of value is causally directly connected to the official act then it is bribery. If the connection is not as direct, then it is probably an illegal gratuity. *Brewster*, 506 F.2d at 81-2.
- The bribery statute requires proof of a "quid pro quo," but a "quid pro quo" is not required for an illegal gratuity. *United States v. Tomblin*, 46 F.3d 1369 (5th Cir. 1995).
- It has been held that the business practice of entertaining and doing favors for potential customers to promote a favorable business climate is not, without more, bribery when the government is the potential customer. Those expenditures are not intended as a "quid pro quo" for business or conditioned upon performance of an official act or "pattern of acts or upon recipient's express or implied agreement to act favorably to donor when necessary." *United States v. Arthur*, 544 F.2d 730 (4th Cir. 1976).

Element 6: Requisite intent

- Bribery requires "corrupt" intent.
- An illegal gratuity requires a lesser and more general criminal intent than corrupt intent. It requires only "...knowledge that the donor was paying him compensation for an official act...." *United States v. Brewster*, 408 U.S. 501, 527 (1972).

Criminal Penalties

The offenses of bribery and illegal gratuity differ greatly with regard to the maximum punishments allowed which makes distinguishing between the two offenses crucial. A bribery conviction is punishable by up to 15 years in prison and three times the value of the bribe, while an illegal gratuity conviction permits only a maximum of 2 years in prison. *Compare* § 201(b), *with* § 201(c).

Key Provisions

Section 201(a) – Definitions

Definition of "Public Official"

> *[T]he term "public official" means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;*

Points to note about the definition:

- The definition of "public official" was not intended to be restricted to persons in a formal employment or agency relationship with the government but embraces all persons who occupy positions of "public trust with official federal responsibilities." *Dixson v. United States*, 468 U.S. 482, 496 (1984).

- In the definition of "public official," the phrase "*employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof*" has been interpreted to include state officials, local administrators, and even private persons in some circumstances.

    - Executives of private nonprofit corporations having operational responsibility for administering a federal housing grant program were "public officials" within the meaning of the bribery statute. *Dixson*, 468 U.S. at 489-96. In *Harlow v. United States*, 301 F.2d 361 (5th Cir. 1962), civilian employees of the European Exchange System, which operated facilities for the benefit of servicemen, were deemed persons acting on behalf of a department of the government.

    - However, the mere presence of federal assistance will not bring a local organization or private person under the bribery statute. The local organization or private person must have some degree of official responsibility for carrying out a federal program or policy. *Dixson*, 468 U.S. at 499.

- The definition does not require that a bribed "employee" be acting in any official function to satisfy the "public official" element. The phrase "any official function" was intended to modify only the phrase "person acting for or on behalf of the United States," and not "officer or employee." *United States v. Gjieli*, 717 F.2d 968, 972 (6th Cir. 1983), *cert. denied* 465 U.S. 1101 (1984).

- A public official who solicits a bribe after having received a termination notice is still a "public official" for purposes of the bribery section. *United States v. Heffler*, 270 F. Supp. 79 (E.D. Pa. 1967), *a'ffd* 402 F.2d 924, *cert. denied* 394 U.S. 946 (1969).

If the definition of "public official" under § 201 cannot be met, then 18 U.S.C. § 666 may be useful as an alternative. Section 666 applies if the solicitor or intended recipient of a bribe is a person who acts as an agent of an organization that receives more than $10,000 in Federal grants, loans, contracts, or insurance funds in one year.

Definition of "Public Act"

> *[T]he term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.*

Points to note about the definition:

- The act does not need to be specified by statute, rule, or regulation. The "official act" element is satisfied if it is an established practice within a department. *United States v. Birdsall*, 233 U.S. 223, 231 (1941).

- The public official need not have the power to make the final decision, but if the advice and recommendation of the public official would be influential, a bribery violation can be established. *United States v. Heffler*, 402 F.2d 924, 925 (3d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969); *Wilson v. United States*, 230 F.2d 521, 524-26 (4th Cir.), *cert. denied*, 351 U.S. 931 (1956); *Krogmann v. United States*, 225 F.2d 220, 225 (6th Cir. 1955).

- A person can be convicted of bribery if that person believes the recipient of the bribe has the power to bring about the desired result. *United States v. Hsieh Hui Mei Chen*, 754 F.2d 817 (9th Cir. 1985), *cert. denied* 471 U.S. 1139 (1985).

- If a public official represents that he can perform the official act the briber seeks even though it is not within the official's power, then the public official may be charged with bribery. *United States v. Arroyo*, 581 F.2d 649 (7th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979).

- If a public official has no authority at all on the matter and the public official commits unauthorized and illegal acts in response to payments, the "official act" element is not satisfied. *Blunden v. United States*, 169 F.2d 991 (6th Cir. 1948).

- A public official by soliciting a bribe on the last day of his employment could be found guilty of a violation even the though the official act the briber sought occurred after the end of his official employment. *United States v. Dobson*, 609 F.2d 840 (5th Cir. 1980), *cert. denied*, 446 U.S. 955 (1980).

- The "official act" the briber seeks need not necessarily be wrong, in the sense that it is expected to result in monetary loss to the government or requires the bribe recipient to do something other than what he is legally obligated to do. *United States v. Miller*, 340 F.2d 421, 424 (4th Cir. 1965).

Section 201(b) - Bribery

> *Whoever -*
> *(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent*
> *(A) to influence any official act; or*
> *(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or*
> *(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;*
> *(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:*
> *(A) being influenced in the performance of any official act;*
> *(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or*
> *(C) being induced to do or omit to do any act in violation of the official duty of such official or person;*

Points to note:

- A bribe can occur without a thing of value being accepted by a public official. *United States v. Jacobs*, 431 F.2d 754 (2d Cir. 1970), *cert. denied,* 402 U.S. 950 (1971). An actual payment of the bribe does not have to occur since subsection (b)(2) requires only that something of value be offered or promised. *United States v. Dixon*, 658 F.2d 181 (3d Cir. 1981).

- The bribery statute can encompass the intent to induce acts that are part of public official's lawful duties and those acts that are erroneously perceived by the briber to be part of public official's lawful duties. *United States v. Gjieli*, 717 F.2d at 971-75.

Definition of "Anything of Value"

The phrase "anything of value" is used throughout Title 18 and has become "words of art." *United States v. Girard*, 601 F.2d 69, 71 (2d. Cir), *cert. denied*, 444 U.S. 871 (1979). It includes tangible and intangible objects. *Id.* The term is interpreted broadly by the courts and includes anything that has subjective value to the recipient

and not necessarily objective or commercial value. *United States v. Williams*, 704 F.2d 603, 622-23 (2d Cir.), *cert. denied*, 464 U.S. 1007 (1983).

Examples include not only cash, securities, jewelry, and favorable financial considerations, but also a promise of a job (*United States v. Biaggi*, 909 F.2d 662, 684-85 (2d Cir. 1990)), shares of worthless stock expected to have considerable value (*United States v. Williams*, 705 F.2d 603 (2d Cir. 1983)), and companionship by providing for transportation and travel expenses for the public official's friend (*United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999)).

Definition of "Intent"

Bribery requires "corrupt intent," which is a higher degree of criminal intent than is required for illegal gratuities. *Hsieh Hui Mei Chen*, 754 F.2d at 822. The different and higher degree of intent is what makes bribery of a public official the greater offense in relation to the lesser-included offense of accepting an illegal gratuity. *Brewster*, 506 F.2d at 72. The intent to influence a public official's behavior on any matter in his official capacity or to induce unlawful action will supply the required culpability. *United States v. Labovitz*, 251 F.2d 393 (3d Cir. 1958).

Definition of "Knowledge"

- Proof of actual or constructive knowledge that the official was receiving something of value is required. *Massa v. Department of Defense*, 815 F.2d 69, 72-73 (Fed. Cir. 1987).

- Knowledge that the person to whom a bribe is offered is a federal official in his official capacity is not an essential element of the offense of offering a bribe to a public official. *United States v. Jennings*, 471 F.2d 1310, 1313 (2d Cir. 1973).

Definition of "Preparation for Bribery"

- Acts of preparation are not a part of the crime of bribery. *Krogmann*, 225 F.2d at 227.

- Although actual transfer of a thing of value is not necessary as long as an offer was made with a corrupt intent, mere acts of preparation are not enough to complete the crime of bribery. *United States v. Kemmel*, 188 F. Supp. 736 (M.D.Pa.1960), *aff'd* 295 F.2d 712, *cert. denied* 368 U.S. 988 (1962).

Definition of "Attempted Bribery"

- Attempted bribery is committed "...so long as bribe is offered or promised with requisite intent to influence any official act..." *Jacobs*, 431 F.2d at 759.

Section 201(c) – Illegal Gratuities

> *Whoever -*
> *(1) otherwise than as provided by law for the proper discharge of official duty*
>
> *(A)directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or*
> *(B)being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;*

Points to note:

- Payments to a public official before or after acts that would have been performed regardless of the payment are probably illegal gratuities rather than bribes, if there is no corrupt intent. But also, not all bribes are paid prior to the official act in question since certain bribes will not actually be conveyed until the act is done. *United States v. Campbell*, 684 F.2d 141 (D. C. Cir. 1982).

- The illegal gratuity section covers those cases in which all of the essential elements of the bribery offense are present except for the element of a specific intent to influence an official act or induce a public official to do or omit to do an act in violation of his lawful duty. *United States v. Irwin*, 354 F.2d 192 (2d Cir. 1965), *cert. denied* 383 U.S. 967 (1966).

Definition of "Intent"

Giving a gift to a public official because of his official duties is an "evil in itself" but does not require a corrupt intent to influence the official's act. *Irwin*, 354 F.2d at 196. A "corrupt" intent is required for bribery, but under the illegal gratuity subsection a public official need only accept because of his position a thing of value, to which he is not lawfully entitled regardless of the intention of the donor or donee. *United States v. Evans*, 572 F.2d 455, 480 (5th Cir. 1978), *rehearing denied* 576 F.2d 931, *cert. denied* 439 U.S. 870 (1978).

The government must prove that the purpose of the gift was due to some official act performed or to be performed by a public official, but the government need not prove that the gratuity caused, prompted, or in any way affected the occurrence or performance of an official act. *Irwin*, 354 F.2d at 196. Also, the intent in giving and

receiving of an illegal gratuity are not interdependent. The recipient's intent may differ from the donor's intent. *Evans*, 572 F.2d at 480.

Scope of Nexus Between Thing of Value and the Official Act

In *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), the Supreme Court held that the government must prove a link between the "thing of value" given to a public official and a specific "official act" for or because of which the thing of value was given. The Court rejected a district court's broader view that an illegal gratuity only required a thing of value be given because of a public official's position. *Sun-Diamond Growers*, 526 U.S. at 406.

It found the phrase "for or because of *any official act*" (emphasis added) is more naturally read as "for or because of some particular official act of whatever identity." *Id.* at 406. Since Congress carefully defined "official act," the Court stated the illegal gratuity statute seems to require that some particular official act be identified and proved. *Id.* It stated a broader reading of the gratuity statute would prohibit token gifts to public officials just because of their position. *Id.* Such a broad interpretation would turn harmless acts into crimes, such as the Court's example of a championship team giving a replica jersey to the President during a White House visit. *Id.*

How strong a link is necessary between an illegal gratuity and an official act is unclear. However, bribery requires a "quid pro quo" or a two-way nexus. The briber's intent is to influence a particular future action of a public official by giving a thing of value. The thing of value then incites a particular official act. On the other hand, an illegal gratuity is a one-way nexus. The thing of value is given with no expectation of a specific official act. *United States v. Schaffer*, 183 F.3d 833, 840 (D.C. Cir. 1999). Also, whereas a bribe is intended to influence future acts, illegal gratuities may be given to reward past acts, persuade public officials with favorable views to maintain that view, or induce future acts or omissions. *Schaffer*, 183 F.3d at 841-42.

CONSPIRACY TO COMMIT OFFENSE OR TO DEFRAUD UNITED STATES

18 U.S.C. § 371

Although at least 24 other conspiracy statutes are found in Titles 15, 18, and 21, § 371 is the general conspiracy statute. Section 371 prohibits any agreement where two or more persons conspire to defraud or commit an offense against the U.S. government. The general purpose of this code section is to protect governmental functions from impairment through deceptive practices and to criminalize any willful impairment of a legitimate function of government, whether or not the improper acts or objective are criminal under another statute. *Tanner v. United States*, 483 U.S. 107, 128 (1987); *United States v. Tuohey*, 867 F.2d 534, 537 (9th Cir. 1989).

Section 371 states:

> *If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.*
>
> *If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.*

The Supreme Court has held that "conspiracy to defraud the United States" means: (1) to cheat the government out of money or property; or (2) to interfere with or obstruct one of its lawful governmental functions by deceit, craft, trickery, or at least by dishonest means. *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924).

Section 371 prohibits two distinct types of conspiracies. The first part of the statute, which is generally known as the "offense clause," prohibits conspiring to commit offenses that are specifically defined in other federal statutes. *United States v. Touhey*, 867 F.2d 534, 536 (9th Cir. 1989). The second part of the statute, which is generally known as the "defraud clause," prohibits conspiring to defraud the United States. *Id.*

The offense clause requires reference in the indictment to another criminal statute which defines the object of the conspiracy. *United States v. Bilzerian*, 926 F.2d 1285, 1301 (2d Cir.), *cert. denied*, 112 S. Ct. 63 (1991). The defraud clause, however, stands on its own and does not need to refer to another statute to define the crime. *Id.*

The defraud clause of § 371 is very broadly stated and encompasses a vast array of conduct, including acts which do not constitute a crime under a separate federal statute. *Tuohey*, 867 F.2d at 537. This is because the term "defraud" when used in §

371 is broader than its common law definition and even goes beyond the definition used in the mail and wire fraud statutes. *McNally v. United States*, 483 U.S. 350, 356 (1987).

Under the defraud clause, the government does not have to establish a pecuniary loss to the United States. *United States v. Puerto*, 730 F.2d 627, 630 (11th Cir.), *cert. denied*, 469 U.S. 847 (1984). Moreover, the government is not required to show that the scheme to defraud was a success or that the government was actually harmed. *United States v. Rosengarten*, 857 F.2d 76, 79 (2d Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989).

More importantly, however, under the defraud clause the government is not required to show that the "fraud" was a crime on its own. *United States v. Jerkins*, 871 F.2d 598, 603 (6th Cir. 1989). This means the prosecutor is not burdened with having to establish all of the elements of an underlying offense and each member's intent to commit that offense (*e.g.*, willfulness). Rather, all the prosecutor must show is that the members agreed to interfere with or obstruct one of the government's lawful functions. *United States v. Hurley*, 957 F.2d 1, 4-5 (1st Cir.), *cert. denied*, 113 S. Ct. 60 (1992).

Though a conspiracy to defraud may exist where no substantive offense has been committed, deceit or trickery in the scheme is essential to satisfying the defrauding requirement in the statute. *Hammerschmidt*, 265 U.S. at 188. Similarly, since the purpose of § 371 is to protect the integrity of the programs and policies of the United States and its agencies, the prosecutor must establish that the target of the fraud was the United States or one of its agencies. *United States v. Lane*, 765 F.2d 1376, 1379 (9th Cir. 1985).

Elements of a Conspiracy under § 371

To establish a conspiracy under 18 U.S.C. § 371, the government must prove three elements:

1) The existence of an agreement by two or more persons to commit an offense against the United States or to defraud the United States;

2) The defendant's knowing and voluntary participation in the conspiracy, and;

3) The commission of an overt act in furtherance of the conspiracy.

United States v. Falcone, 311 U.S. 205, 210 (1940).

Element 1: The existence of an agreement by two or more persons to commit an offense against the United States or to defraud the United States

The essence of the crime of conspiracy is the agreement. *United States v. Falcone*, 311 U.S. 205, 210 (1940). Stated another way, without an agreement there

can be no conspiracy. Furthermore, because the agreement is the crime, success of the conspiracy is irrelevant. *United States v. Nicoll*, 664 F.2d 1308, 1315 (5th Cir.), *cert. denied*, 457 U.S. 1118 (1982). It is for this reason that a defendant may be charged with conspiracy as well as the substantive offense which was the object of the conspiracy. *Iannelli v. United States*, 420 U.S. 770, 791 (1975).

A defendant cannot conspire with himself or herself. *Morrison v. California*, 291 U.S. 82, 92 (1934). In order to establish the existence of an agreement, the government must show that the defendant and at least one other person reached an understanding or agreement to carry out the objective of the conspiracy. *United States v. Giry*, 818 F.2d 120, 125 (1st Cir.), *cert. denied*, 484 U.S. 855 (1987).

"The offense of conspiracy consists of an agreement between [two or more persons] to commit an offense, attended by an act of one or more of the conspirators to effect the object of the conspiracy." *United States v. Hoelscher*, 764 F.2d 491, 494 (8th Cir. 1985).

Under the intra-corporate conspiracy doctrine, a corporation cannot conspire with its employees, and its employees cannot conspire with one another when acting within the scope of their employment. *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1036 (11th Cir. 2000). However, the First, Sixth, Eighth, Ninth, and Eleventh Circuits have addressed this issue ruling similarly that the intra-corporate conspiracy doctrine does not apply to intra-corporate criminal conspiracies arising under § 371. *Id.* It is noted that the majority of reported decisions involving intra-corporate conspiracies under § 371 involved multiple human conspirators in addition to the corporate coconspirator. *U.S. v. Stevens*, 909 F.2d 431, 433 (11th Cir. 1990). Some cases have expressly indicated that multiple actors must be involved. See, *e.g.*, *U.S. v. Peters*, 732 F.2d 1004 (1st Cir.1984).

Withdrawal is not an affirmative defense if the conspiratorial agreement has already been made. *See United States v. Rogers*, 102 F.3d 641, 644 (1st Cir. 1996).

The word "defraud" in § 371 not only reaches financial or property loss through use of a scheme or artifice to defraud but also is designed and intended to protect the integrity of the United States and its agencies, programs and policies. *United States v. Burgin*, 621 F.2d 1352, 1356 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980). Thus, proof that the United States has been defrauded under this statute does not require any showing of monetary or proprietary loss. *United States v. Conover*, 772 F.2d 765 (11th Cir. 1985), *aff'd*, *sub. nom. Tanner v. United States*, 483 U.S. 107 (1987).

If the defendant and others have engaged in dishonest practices in connection with a program administered by an agency of the Government, it constitutes a fraud on the United States under § 371. *United States v. Gallup*, 812 F.2d 1271, 1276 (10th Cir. 1987). For example, in *United States v. Hopkins*, 916 F.2d 207 (5th Cir. 1990), the defendants' actions in disguising contributions were designed to evade the Federal

Election Commission's reporting requirements and constituted fraud on the agency under § 371.

Element 2: The defendant's knowing and voluntary participation in the conspiracy

In order to establish a defendant's membership in a conspiracy, the government must prove that the defendant knew of the conspiracy and that he or she intended to join it and to accomplish the object of the conspiracy. *United States v. Flaherty*, 668 F.2d 566, 580 (1st Cir. 1981); *United States v. Southland*, 760 F.2d 1366, 1169 (2d Cir.), *cert. denied*, 474 U.S. 825 (1985).

The intent required for a conspiracy to defraud the government is that the defendant had the intent (i) to defraud, (ii) to make false statements or representations to the government or its agencies in order to obtain property of the government, or (iii) to perform acts or make statements that defendant knew to be false, fraudulent or deceitful to a government agency, intending to disrupt the functions of the agency or of the government. It is sufficient for the government to prove that the defendant knew the statements were false or fraudulent when made. The government is not required to prove that the statements ultimately resulted in any actual loss to the government of any property or funds, only that the defendant's activities impeded or interfered with legitimate governmental functions. *See United States v. Puerto*, 730 F.2d 627 (11th Cir.), *cert. denied*, 469 U.S. 847 (1984); *United States v. Tuohey*, 867 F.2d 534 (9th Cir. 1989); *United States v. Sprecher*, 783 F. Supp. 133, 156 (S.D.N.Y. 1992) ("it is sufficient that the defendant engaged in acts that interfered with or obstructed a lawful governmental function by deceit, craft, trickery or by means that were dishonest"), *modified on other grounds*, 988 F.2d 318 (2d Cir. 1993).

Although the government must prove that a defendant was a member of a conspiracy, this may be satisfied by a showing of only a "slight connection" to the conspiracy, *i.e.*, circumstantial evidence as to the defendant's knowledge of the conspiracy and its scope sufficient to raise a reasonable inference that the defendant participated in the conspiracy. *United States v. Cooper*, 567 F.2d 252, 253 (3d Cir. 1977); *United States v. Christian*, 786 F.2d 203, 211 (6th Cir. 1986); *United States v. Moya-Gomez*, 860 F.2d 706, 758 (7th Cir. 1988), *cert. denied*, 492 F.2d 908 (1989); *United States v. Ivey*, 915 F.2d 380, 384 (8th Cir. 1990); *United States v. Boone*, 951 F.2d 1526, 1543 (9th Cir. 1991).

Courts have generally relied on the U.S. Supreme Court definition of "defraud" articulated in the *Hass* and *Hammerschmidt* decisions. *Hass v. Henkel*, 216 U.S. 462 (1910); *Hammerschmidt v. United States*, 265 U.S. 182 (1924). *Hass* stated:

> *The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government . . . (A)ny conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of its operation and*

reports as fair, impartial and reasonably accurate, would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation.

Hass, 216 U.S. at 479-480. *Hammerschmidt* defined "defraud" as follows:

To conspire to defraud the United States means primarily to cheat the Government out of property or money, but it also means to interfere with or obstruct one of its lawful governmental functions by deceit, craft or trickery, or at least by means that are dishonest. It is not necessary that the Government shall be subjected to property or pecuniary loss by the fraud, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention.

Hammerschmidt, 265 U.S. at 188.

Element 3: The commission of an overt act in furtherance of the conspiracy

In order to establish a conspiracy, the government must prove that a member of the conspiracy committed an overt act in furtherance of the conspiracy. The function of the overt act requirement is to show that the conspiracy is at work and is not simply an agreement sitting solely in the minds of the conspirators. *United States v. Yates*, 354 U.S. 298, 334 (1957).

An overt act is any act done by a member of the conspiracy for the purpose of carrying out or accomplishing the object of the conspiracy. *United States v. Falcone*, 311 U.S. 205, 210 (1940). In addition, an overt act need not be a criminal act or a crime. It may be totally innocent and legal. *United States v. Hermes*, 847 F.2d 493, 495 (8th Cir. 1988).

In a criminal conspiracy, the conspiracy is the gist of the crime, and the function of the overt act is to show that agreeing or conspiring has progressed from the field of thought and talk into action and it completes the offense. *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959).

The government must prove that only one of the conspirators engaged in one overt act in furtherance of the conspiracy. *United States v. Hermes*, 847 F.2d 493, 495 (8th Cir. 1988). The government may prove uncharged overt acts to satisfy this element. *United States v. Sellers*, 603 F.2d 53 (8th Cir. 1979), *vacated*, 447 U.S. 932 (1980), *aff'd in relevant part*, 628 F.2d 1085 (8th Cir. 1980).

Summary

In summary, activities which courts have held defraud the United States under § 371 affect the government in at least one of three ways:

1) They cheat the government out of money or property;
2) They interfere or obstruct legitimate Government activity; or
3) They make wrongful use of a governmental instrumentality.

Proof Chart

Element	Synopsis of Evidence
Agreement between two or more persons to commit crime against the U.S. or to defraud the U.S.	
Knowing and voluntary Participation in the conspiracy	
Overt act in furtherance of the conspiracy	

CONSPIRACY TO DEFRAUD THE GOVERNMENT WITH RESPECT TO CLAIMS

18 U.S.C. § 286

> *Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined under this title or imprisoned not more than ten years, or both.*

Elements

To establish a violation of 18 U.S.C. § 286, the government must prove the following four elements:

1) An agreement, combination, or conspiracy;

2) intent to defraud the United States or any department or agency thereof;

3) by obtaining or aiding to obtain the payment or allowance of any false, fictitious, or fraudulent claim; and

4) an overt act in furtherance of the agreement, combination or conspiracy.

This section of the criminal code is largely redundant of the general conspiracy statute found at 18 U.S.C. § 371, and the section discussing the general conspiracy statute in this Reference Guide should be consulted.

Element 1: Agreement, combination, conspiracy

The government must prove an agreement, combination or conspiracy. These three terms are over-lapping in part, and their use together renders the statute less than clear. The meaning of "agreement" is straightforward—it is a meeting of the minds. However, a mere agreement without something more is not illegal. What is meant by a "combination" is unclear. It could be a mere agreement, or it could be a full-blown conspiracy called by another name. The term "conspiracy" has an added dimension beyond a mere agreement, because a conspiracy requires the commission of an overt act in furtherance of the conspiracy. *See, e.g., United States v. Falcone*, 311 U.S. 205, 210 (1940).

Exactly what Congress intended when it mixed these three different terms in the § 286 is unclear. The best construction of § 286 is that it even though it refers to agreements and combinations, it actually requires proof of a conspiracy similar to the general conspiracy statute in 18 U.S.C. § 371. Mere proof of an agreement or combination not having the elements of a conspiracy will not suffice to sustain a conviction. A conspiracy under the analogous § 371 has the following elements:

1) the existence of an agreement by two or more persons to defraud the United States;

2) the defendant's knowing and voluntary participation in the agreement, combination or conspiracy; and

3) the commission of an overt act in furtherance of the conspiracy.

Element 2: To defraud the United States or an agency of the United States.

The aim of the agreement, combination or conspiracy must be to cheat the government by securing payment or approval of a false claim. *See generally, Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). The statute provides that the fraud can be perpetrated on the United States or on an agency of the United States, which includes not only executive branch agencies, but also independent agencies, and any agency that Congress has recognized as an agency of the United States. "Fraud upon an agency is fraud upon the United States." *See United States v. Samuel Dunkel & Co.*, 184 F.2d 894, 898 (2d Cir. 1950) (*quoting Haas v. Henkel*, 216 U.S. 462, 479 (1910)). Title 5, § 105, defines an Executive Agency as an "executive department, a Government corporation, and an independent establishment."

Element 3: Obtaining or aiding to obtain the payment or allowance of a false claim

The object of the conspiracy must be to obtain payment or approval of a false, fictitious, or fraudulent claim. Thus, this section is narrower than the general conspiracy statute, 18 U.S.C. § 371, because it reaches only a specific category of conspiracy to defraud the government—*i.e.*, the payment or allowance of a false or fraudulent claim. Nevertheless, within that limitation the statute still has a broad reach because the Supreme Court has stated that a claim can include "all fraudulent attempts to cause the Government to pay out sums of money." *United States v. Niefert-White Co.*, 390 U.S. 228, 233 (1968). Similarly, the court in *O'Brien & Mach. Co. v. United States*, adopted the following broad definition:

> *[T]he rule which emerges from decisions is rather that "claim" is a word of many meanings, to be determined in the context of the purpose of the statute in which it is found. In the False Claims Act, which was remedially aimed at all types of financial frauds, on the Government, the "claim" against the Government is held to be conduct which after some intermediate steps has the effect of bringing about a payment of money or other financial loss by the Government. Under other statutes, in the light of their statutory purpose the objective of the claim need not be money.*

O'Brien & Mach. Co. v. United States, 591 F.2d 666, 677-78 (Ct. Cl. 1979).

Examples of a claim violating the statute are:

(i) knowingly making false statements on a federal credit statement form submitted to the Federal Housing Administration;

(ii) filing a false or fraudulent claim for advance funding under the Small Business Administration 8(a) program; or

(iii) submitting false claims to Medicare for ambulance services.

United States v. Geiger, 190 F.3d 661 (5th Cir. 1999); *United States v. Uzzell*, 780 F.2d 1143 (4th Cir. 1986); *C.I.T. Corp. v. United States*, 150 F.2d 85, 87 (9th Cir. 1945).

Element 4: The commission of an overt act in furtherance of the conspiracy

As alluded to above, in order to establish a conspiracy, the government must prove that a member of the conspiracy committed an overt act in furtherance of the conspiracy. The function of the overt act requirement is to show that the conspiracy is at work and is not simply an agreement sitting solely in the minds of the conspirators. *United States v. Yates*, 354 U.S. 298, 334 (1957).

An overt act is any act done by a member of the conspiracy for the purpose of carrying out or accomplishing the object of the conspiracy. *Falcone*, 311 U.S. at 210. In addition, an overt act need not be a criminal act or a crime. It may be totally innocent and legal. *United States v. Hermes*, 847 F.2d 493, 495 (8th Cir. 1988).

In a criminal conspiracy, the conspiracy is the gist of the crime, and the function of the overt act is to show that agreeing or conspiring has progressed from the field of thought and talk into action, and it completes the offense. *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959).

The government must prove that only one of the conspirators engaged in one overt act in furtherance of the conspiracy. *Hermes*, 847 F.2d at 495. Further, the government may prove uncharged overt acts to satisfy this element. *United States v. Sellers*, 603 F.2d 53 (8th Cir. 1979), *vacated*, 447 U.S. 932 (1980), *aff'd in relevant part*, 628 F.2d 1085 (8th Cir. 1980).

Proof Chart

Element	Synopsis of Evidence
Agreement, combination, or conspiracy	
Intent to defraud	
Obtaining payment by false claim	
Overt act	

FALSE, FICTITIOUS OR FRAUDULENT CLAIMS

18 U.S.C. § 287

> *Whoever makes or presents to any person or officer in the civil, military or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years*

Section 287 is broadly designed to "protect the government against those who would cheat or mislead it in the administration of its programs," and it has been employed to combat fraudulent claims filed under numerous Federal programs. *United States v. White*, 27 F.3d 1531, 1535 (11th Cir. 1994).

Elements

To establish a violation of 18 U.S.C. § 287, the government must prove three elements, and in some jurisdictions a fourth element of materiality:

1) Defendant made or presented a claim to a department of the United States;

2) The claim was false, fictitious, or fraudulent claim;

3) Defendant knew the claim was false, fictitious or fraudulent;

4) In some circuits, the claim, or statements in support of the claim, were materially false.

Element 1: Made or presented a claim to a department of the United States.

The statute does not define the term, "claim," but the statute has been applied in a wide variety of circumstances ranging from invoices to claims for reimbursement to loan applications. The related False Claims Act, 31 U.S.C. § 3729, *et seq.*, has the following definition of "claim" at § 3729(c):

> *For the purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.*

Under this analogous definition, a claim is within the False Claims Act if a person makes the claim against anyone and the amount claimed is paid or reimbursed by the federal government. The actual form of the claim may vary, ranging from invoices, to applications for grants, to requests for equitable adjustments. The Supreme Court has said that the False Claims Act is a "remedial statute [that] reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money." *United States v. Neifert-White Co.*, 390 U.S. 228 (1968). Thus, the term "claim" in the analogous False Claims Act has been broadly construed, and there is no reason that it would not be broadly construed in cases prosecuted under 18 U.S.C. § 287 as well.

However, the term "claim" does not reach every questionable demand for payment, but only to false or fraudulent claims. For example, in a case under the False Claims Act, a court recognized a distinction between a false claim and a breach of contract where the breach is not accompanied by evidence of fraud. In *Tyger Constr. Co. Inc. v. United States*, 28 Fed. Cl. 35, 36 (1993), the court held that False Claims Act liability did not attach to a good faith legal opinion that a construction project was substantially complete. This reasoning should apply to prosecutions under 18 U.S.C. § 287.

a) The claim can be presented through a third-party.

Presentation of a claim is more than an intention to make a claim. The claim must be presented actually and physically, and thereby made to the government. The clearest case is presentation directly to the government. However, a defendant can be guilty of causing someone else to submit the claim to the government, and thus it is sufficient if the government proves that the defendant submitted the claim through an intermediary. In *United States v. Murph*, 707 F.2d 895, 896 (6th Cir.), *cert. denied*, 464 U.S. 844 (1983), the defendant sold to an intermediary a tax return falsely claiming a refund and knew that the return would be presented to the government to claim the refund. The court rejected the argument that defendant did not cause a violation of § 287 because the claim was submitted by an intermediary. Similarly, cashing a federal refund check with a third-party constitutes making a false claim on the United States. *See United States v. Branker*, 395 F.2d 881 (2d Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969).

In *United States v. Montoya*, 716 F.2d 1340 (10th Cir. 1983), the defendant submitted claims to the State of New Mexico falsely claiming that he had "weatherized' low-income homes, when he had never done the work. The federal government funded the project, in part. The court held that "claims presented to an intermediary have been held to come within § 287 as long as payment comes ultimately from the federal government." *Id.* at 1342. "[A] person may be guilty of causing a false claim to be presented to the United States even though he uses an innocent intermediary (in this case insurance carriers) to actually pass on the claims to the United States." *Id.* The court also said that the federal government's involvement with the claim must be more than nominal, *citing Lowe v. United States*, 141 F.2d 1005 (5th Cir. 1944). In *Montoya*,

the weatherization project, although not subject to daily federal control, stemmed from federal, not state legislation. Consequently, the contractors were required to follow federal regulations in implementing the project, and the State was required to account for all monies spent. The court deemed that to be sufficient federal involvement.

It is important to note that the prosecution need not prove that the defendant knew of the federal government's involvement. *Montoya,* 716 F.2d at 1344.

b) Presented to the United States or department or agency

The statute provides that the claim must be *"upon or against the United States, or any department or agency thereof."* The language of 18 U.S.C. § 6 suggests that the terms "department" and "agency" include any institution in which the United States has a proprietary interest. Thus, the statute covers most operations and activities of the federal government.

It is unclear if the statute covers non-appropriated fund activities such as post exchanges. The Department of Justice takes the position that the False Claims Act applies to non-appropriated fund activities. At least one case suggests that the method of funding is not dispositive and that the False Claims Act would apply to military PXs. In *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485 (1942), a case involving the immunity of a post exchange from state taxation, the Court ruled that post exchanges are "arms of the Government deemed by it essential for the performance of governmental functions" and "integral parts of the war Department. On the other hand, in *United States v. Howell*, 318 F.2d 162 (9th Cir. 1963), the Ninth Circuit refused to treat underreporting of a concessionaire's profits (a portion of which were paid to a post exchange) as a claim that violated the False Claims Act.

Element 2: The claim was false, fictitious or fraudulent.

To satisfy this element, it is not sufficient to prove only that the claim or supporting statement did not correspond with truth or reality. As used in the statute, "false" means "something more than untrue; it [false] means something designedly untrue and deceitful and implies an intention to perpetrate some treachery or fraud." It signifies more than mere untruth, and means claims or statements calculated to induce agency reliance or action. *United States v. Snider*, 502 F.2d 645, 651-52 (4th Cir. 1974). Thus, the element of false, fictitious or fraudulent includes a degree of intent, as discussed in the next element.

Element 3: The defendant knew that the claim was false, fictitious of fraudulent.

Courts are divided on the degree of intent necessary to constitute a "knowing" presentation of a false claim. The Second, Fourth, Ninth, Tenth and District of Columbia Circuits define the requisite state of mind as "knowledge of falsity," but do not require proof of specific intent to defraud the government. *See United States v. Barker*, 967 F.2d 1275, 1278-79 (9th Cir. 1991); *United States v. Coachman*, 727 F.2d 1293,

1302 (D.C. Cir. 1984); *United States v. Irwin*, 654 F.2d 671, 681-82 (10th Cir. 1981); *United States v. Precision Med. Labs., Inc.*, 593 F.2d 434, 443 (2d Cir. 1978); *United States v. Maher*, 582 F.2d 842, 843 (4th Cir. 1978), *cert. denied,* 439 U.S. 1115 (1979).

The Eighth Circuit, on the other hand, requires a specific intent to deceive, but allows a jury to infer such intent when the defendant knew the claim was false. *United States v. Martin*, 772 F.2d 1442, 1444-45 (8th Cir. 1985); *United States v. Rifen*, 577 F.2d 1111, 1113 (8th Cir. 1978). Further, the government need not prove that a defendant knew of the specific prohibitions of 18 U.S.C. § 287; *Johnson v. United States*, 410 F.2d 38 (8th Cir, 1969), *cert. denied*, 396 U.S. 822 (1969). Thus, as a practical matter, it seems that the law in the Eighth Circuit is not significantly different than the law in the other circuits cited above.

In the Seventh Circuit, there are decisions going both ways on the issue of specific intent. *Compare United States v. Catton*, 89 F.3d 387, 392 (7th Cir. 1996) *with United States v. Nazon*, 940 F.2d 255, 260 (7th Cir. 1991) *and United States v. Haddon*, 927 F.2d 942, 950 (7th Cir. 1991).

The Fourth Circuit's decision in *United States v. Maher*, 582 F.2d 842, has a good analysis of the element of intent. The court held that the intent essential for a conviction under 18 U.S.C. § 287 is not limited to the intent to defraud. The language of the statute states the terms, "false, fictitious, or fraudulent," in the disjunctive, and the court construed the language to mean that three kinds of claims may be submitted in violation of § 287 and not only claims that are fraudulent. *Id.* at 847. The court further stated:

> *Criminal intent may be proved either by showing that the defendant acted for a specific purpose to violate the law or that he acted with an awareness that he what he was doing was morally wrong, whether or not he had actual knowledge that he was doing something that the law forbids . . . . § 287 does not require proof of specific intent to defraud . . . because the purpose of § 287 will not be furthered by limiting criminal prosecutions to instances where the defendant is motivated solely by an intent to cheat the government or to gain an unjust benefit . . . . [the statute requires] only proof that the defendant acted for the purpose of impairing, obstructing, or defeating' a lawful function of the government. Id.* at 847-48.

Courts have held that knowledge can be inferred from the defendant's reckless disregard for the truth, as well as conscious avoidance of the truth. *Nazon*, 940 F.2d at 258; *United States v. Holloway*, 731 F.2d 378, 381 (6th Cir. 1984); *United States v. Cogdell*, 844 F.2d 179, 181 (4th Cir. 1988); *United States v. Gold*, 743 F.2d 800, 822 (11th Cir. 1984).

The government need not prove that the defendant knew that federal money was involved with the program or project. *See, United States v. Martin*, 772 F.2d 1442, 1445

(8th Cir. 1985); *Montoya*, 716 F.2d at 1344. Thus, a defendant's ignorance of federal involvement is not a viable defense.

Element 4: In some jurisdictions, the government must prove that the falsity was material.

The concept of materiality is closely related the concept of reliance. A falsification is material if it is calculated to induce action or reliance by an agency of the United States. Is it one that could affect or influence the exercise of government functions? Does it have a natural tendency to or is it capable of influencing the government's decision. *United States v. Adler*, 623 F.2d 1287, 1291 (8th Cir. 1980). Not every false statement is material. For example, in *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974), the defendants protested the use of taxes to support the Vietnam War by claiming 3 billion exemptions on their tax returns. The court held that no sensible IRS agent could have relied on the claimed exemptions, and those falsely stated exemptions were obviously not material to any decision made by the government.

Several circuits have held that materiality is not an element. *See, e.g., United States v. Harvard*, 103 F.2d 412, 419 (5th Cir. 1997); *United States v. Taylor*, 66 F.3d 254, 255 (9th Cir. 1995); *United States v. Parsons*, 967 F.2d 452, 455 (10th Cir. 1992); *United States v. Elkin*, 731 F.2d 1005, 1009 (2d 1984). However, the Fourth and Eighth Circuits consider materiality to be an element of the offense. *See United States v. Baker*, 200 F.3d 558, 561 (8th Cir. 2000); *Adler*, 623 F.2d 1287; *United States v. Snider*, 502 F.2d 645, 652 (4th Cir. 1974).

Proof Chart

Element	Synopsis of Evidence
Claim	
False, fictitious or fraudulent	
Knowledge	
Materiality	

FALSE STATEMENTS

18 U.S.C. § 1001

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –

falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

makes any materially false, fictitious, or fraudulent statement or representation; or

makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to -

administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate

Elements

To establish a violation of 18 U.S.C. § 1001, the government must prove four elements:

1. A person or entity "knowingly and willfully";
2. Makes a false statement;
3. The false statement was material; and
4. The false statement concerned a matter within the jurisdiction of the

federal government.

Element 1: "Knowingly and willfully"

The first element which must be proven under 18 U.S.C. § 1001 requires that the false statement, concealment or cover up be "knowingly and willfully" done. "The statement must have been made with an intent to deceive, a design to induce belief in the falsity or to mislead, but § 1001 does not require an intent to defraud—that is, the intent to deprive someone of something by means of deceit." *United States v. Lichenstein*, 610 F.2d 1272, 1276-77 (5th Cir.), *cert. denied*, 447 U.S. 907 (1980). The government may prove that a false statement was made "knowingly and willfully" by offering evidence that defendants acted deliberately and with knowledge that the representation was false. *See United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990).

As used in the statute, the term "knowingly" requires only that the defendant acted with knowledge of the falsity. *See United States v. Lange*, 528 F.2d 1280, 1287-89 (5th Cir. 1976). As in other situations, to commit an act "knowingly" is to do so with knowledge or awareness of the facts or situation, and not because of mistake, accident or some other innocent reason.

The false statement need not be made with an intent to defraud if there is an intent to mislead or to induce belief in its falsity. Reckless disregard of whether a statement is true, or a conscious effort to avoid learning the truth, can be construed as acting "knowingly." *United States v. Evans*, 559 F.2d 244, 246 (5th Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978). A defendant is not relieved of the consequences of a material misrepresentation by lack of knowledge when the means of ascertaining truthfulness are available. In appropriate circumstances, the government may establish the defendant's knowledge of falsity by proving that the defendant either knew the statement was false or acted with a conscious purpose to avoid learning the truth. *See United States v. West*, 666 F.2d 16, 19 (2d Cir. 1981); *Lange*, 528 F.2d at 1288; *United States v. Clearfield*, 358 F. Supp. 564, 574 (E.D. Pa. 1973). Proof that the defendant acted with reckless disregard or reckless indifference may therefore satisfy the knowledge requirement, when the defendant makes a false material statement and consciously avoids learning the facts or intends to deceive the government. *See United States v. Schaffer*, 600 F.2d 1120, 1122 (5th Cir. 1979).

The term "willfully" means no more than that the forbidden act was done deliberately and with knowledge, and does not require proof of evil intent. *McClanahan v. United States*, 230 F.2d 919, 924 (5th Cir. 1955). An act is done "willfully" if done voluntarily and intentionally and with the specific intent to do something the law forbids. There is no requirement that the government show evil intent on the part of a defendant in order to prove that the act was done "willfully." *See generally United States v. Gregg*, 612 F.2d 43, 50-51 (2d Cir. 1979).

Element 2: A false statement

Element two has three different prongs. Fulfillment of only one prong is necessary to satisfy this element's requirements. The following is an examination of each of these three prongs of element two.

Element 2(a): "falsifies, conceals or covers up by any trick, scheme or device a material fact"

The word "false" means more than simply incorrect or untrue. An intent to deceive or mislead is required. *United States v. Lange,* 528 F.2d 1280 (1976). Section 1001 of Title 18, United States Code, requires that the statement or representation actually be false, and the government has the burden of establishing the alleged falsity of the statement. *Webster's 3d International Dictionary* defines the adjective "false" as "not corresponding to truth or reality." Although a statement may be misleading, unauthorized, or even fraudulent, a conviction under this section generally cannot be sustained unless the statement also is false. *See United States v. Diogo*, 320 F.2d 898, 905-09 (2d Cir. 1963). The statute also covers half-truths where there is a duty to speak the truth—as in a sworn deposition before an agency. *See generally United States v. Lutwak*, 195 F.2d 748 (7th Cir. 1948), *aff'd*, 344 U.S. 604 (1953).

Concealment and cover-up are essentially identical concepts and often result from falsification. These acts need not have any relation to a statement or representation. Concealment may involve a failure to disclose or partial disclosures of information required on an application form; however, when using such a theory, the government must prove that the defendant had a duty to disclose the facts in question at the time of the alleged concealment of them. *United States v. Irwin*, 654 F.2d 671, 678-79 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982). Concealment may also involve a merely physical act of concealment such as transferring inspection stamps, changing numbers on bottles to conceal rejection, conceal use of certain drugs, or using false stamps to conceal ownership of tobacco.

Element 2(b): "makes any false, fictitious or fraudulent statements or representations"

Proving this alternative prong of element 2 is governed by the same standards as proving the first prong of element 2, discussed above.

Element 2(c): "makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry"

For a violation of 18 U.S.C. § 1001, a false statement may be written or oral, sworn or unsworn, voluntarily made in regard to information sought as or required by law, signed or unsigned. *See generally United States v. Beacon Brass Co.*, 344 U.S. 43, 46 (1952).

Element 3: The false statement was material.

In addition to demonstrating the defendant both knowingly and willingly communicated a false statement, the government must also prove the item in question was material. To establish materiality as an element, it is sufficient that the statement have the capacity or a natural tendency to influence the determination required to be made. *See United States v. Lueben*, 838 F.2d 751, 754 (5th Cir. 1988); *United States v. Weinstock*, 231 F.2d 699, 701 (D.C. Cir. 1956); *United States v. Ramos*, 725 F.2d 1322 (11th Cir. 1984).

The test for materiality under 18 U.S.C. § 1001 is not whether the false statement actually influenced a government function, but whether it had the capacity to influence. *Lueben, supra,* 838 F.2d at 754; *United States v. Lichenstein*, 610 F.2d 1272, 1278 (5th Cir. 1980). *Weinstock, supra,* held that "the issue to which the false statement is material need not be the main issue; it may be a collateral issue. And it need not bear directly upon the issue but may merely augment or diminish the evidence upon some point. But it must have some weight in the process of reaching a decision." 231 F.2d at 703.

Element 4: The false statement concerned a matter within the jurisdiction of the federal government

Section 1001's jurisdictional requirements are satisfied if:

1. The agency had the power to act on the statement. *United States v. DiFonzo*, 603 F.2d 1260, 1264 (7th Cir. 1979), *cert. denied* 444 U.S. 1018 (1980);

2. There was an "intended" relationship between the act and the Federal government. *United States v. Stanford*, 589 F.2d 285, 297 (7th Cir. 1978), *cert. denied* 440 U.S. 983 (1979); or

3. The act was calculated to induce government action. *United States v. Barbato*, 471 F.2d 918, 922 (1st Cir. 1973).

Courts have frequently held that the phrase "matter within the jurisdiction," as used in Section 1001, means a matter regarding which the department or agency in question has the authority to take action. *See Ogden v. United States*, 303 F.2d 724, 743 (9th Cir. 1962), *cert. denied* 376 U.S. 973 (1964); *United States v. Ross*, 77 F.3d 1525 (7th Cir. 1996) (addressing false statements within the jurisdiction of the Department of Education).

In *United States v. Gibson*, 881 F.2d 318, 322-23 (6th Cir. 1989), the following examples were cited as false statements that could be prosecuted under Section 1001 although indirectly made to the Federal government (so-called indirect submissions) via private entities receiving federal funds or subject to federal regulation or supervision:

- False inspection and weight certificates submitted in transaction subject to regulation by Department of Agriculture, *citing United States v. Kirby*, 587 F.2d 876, 881 (7th Cir. 1978);

- False statements to surety insured by Small Business Administration, *citing United States v. Dick*, 744 F.2d 546, 554 (7th Cir. 1984);

- False statements to private firm constructing nuclear power plant regulated by Nuclear Regulatory Commission), *citing United States v. Green*, 745 F.2d 1205, 1208-09 (9th Cir. 1984), *cert. denied,* 474 U.S. 925 (1985);

- False statements to oil company subject to federal regulation, *citing United States v. Wolf*, 645 F.2d 23, 25-26 (10th Cir. 1981);

- False statements to insurance company acting as payment agent for Medicare, *citing United States v. Matanky*, 482 F.2d 1319, 1322 (9th Cir. 1973), *cert. denied,* 414 U.S. 1039 (1973);

- False time sheet submitted to accounting office of community organization receiving CETA funds, *citing United States v. Mouton*, 657 F.2d 736, 739 (5th Cir. 1981);

- False statements to savings and loan association insured by FSLIC, *citing United States v. Cartwright*, 632 F.2d 1290, 1292-93 (5th Cir. 1980).

Facts that need not be proven

The courts have held that 18 U.S.C. § 1001 does not require proof of the following:

1. A financial or property loss to the Federal government (though one often exists), *United States v. Richmond*, 700 F.2d 1183, 1188 (8th Cir.1983);

2. That the false statement be made or submitted directly to the federal government, *United States v. Uni Oil Co.*, 646 F.2d 946, 954-55 (5th Cir. 1981), *cert. denied*, 455 U.S. 908 (1982);

3. That the government took action based upon the statement, *Brandow v. United States*, 268 F.2d 559 (9th Cir. 1959); *United States v. Quirk*, 167 F. Supp. 462 (E.D. Pa. 1958), *aff'd*, 266 F.2d 26 (3d Cir. 1959);

4. Reliance by the government, *United States v. Lichenstein*, 610 F.2d 1272, 1278 (5th Cir. 1980);

5. The defendant's actual knowledge of Federal agency jurisdiction, *United States v. Yermian*, 468 U.S. 63 (1984); on remand, 741 F.2d 267 (1984) ; or

6. That the false statement be written, signed or sworn, *United States v. Beacon Brass Co.*, 344 U.S. 43, 46 (1952).

Proof Chart

Element	Synopsis of Evidence
Defendant acted knowingly and willfully	
Defendant made false statement	
False statement was material	
Matter was within federal jurisdiction	

MAIL AND WIRE FRAUD

18 U.S.C. § 1341—Mail Fraud

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives there from, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Elements of Mail Fraud

To establish a violation of 18 U.S.C. § 1341, the government must prove three elements:

(1) The person devised or intended to devise a scheme to defraud (or to perform specified fraudulent acts),

(2) Intent, and

(3) Used the mail for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts).

Schmuck v. United States, 489 U.S. 705, 721 n.10 (1989); *see also Pereira v. United States*, 347 U.S. 1, 8 (1954) ("The elements of the offense of mail fraud under . . . § 1341 are (1) a scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme.").

Element 1: "Scheme to Defraud"

The first element that must be proven under 18 U.S.C. § 1341 requires that the person devised or intended to devise a scheme to defraud. The mail fraud (and wire

fraud) statute(s) do not define the terms "scheme" or "artifice," and the courts have traditionally been reluctant to offer definitions of either term except in the broadest and most general terms. Specifically, "Congress did not define 'scheme or artifice to defraud' when it first coined that phrase, nor has it since. Instead that expression has taken on its present meaning from 111 years of case law. *United States v. Lemire*, 720 F.2d 1327, 1335 (D.C. Cir. 1983).

The fraudulent aspect of the scheme to defraud is to be measured by non-technical standards and is not restricted by any common-law definition of false pretenses. "[T]he words 'to defraud' in the mail fraud statute have the 'common understanding' of 'wrongdoing one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, chicane, or overreaching.'" *Carpenter v. United States*, 484 U.S. 19, 27 (1987) (quoting *McNally v. United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924))). "The concept of 'fraud' includes the act of embezzlement, which is 'the fraudulent appropriation to one's own use of the money or goods entrusted to one's own care by another.'" *Id.* (quoting *Grin v. Shine*, 187 U.S. 181, 189 (1902)).

"Scheme"

It is important to note "it is the scheme to defraud and not actual fraud that is required." *United States v. Reid*, 533 F.2d 1255, 1264 (D.C. Cir. 1976). "No particular type of victim is required . . . nor need the scheme have succeeded," and there need not be any actual loss to the victims. *United States v. Coachman*, 727 F.2d 1293, 1302-03 n.43 (D.C. Cir. 1984); *see United States v. Pollack*, 534 F.2d 964, 971 (D.C. Cir. 1976). "The amount of money realized as a result of the scheme is not an essential element of mail fraud. It was not even necessary to prove that the scheme succeeded." *United States v. Jordan*, 626 F.2d 928, 931 (D.C. Cir. 1980).

Proving the Scheme

To sustain a conviction the government must prove the existence of a scheme; it is not required, however, to prove all details or all instances of allegedly illicit conduct. *See, e.g., United States v. Stull*, 743 F.2d 439, 442 n.2 (6th Cir. 1984) ("It is well established that proof of every allegation is not required in order to convict; the government need only prove that the scheme to defraud existed."), *cert. denied*, 470 U.S. 1062 (1985). It is enough that the defendant knowingly and willingly participated in the scheme. *United States v. Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990).

Element 2: Intent

The government must also prove the defendant had the specific intent to defraud. *See United States v. Diggs*, 613 F.2d 988, 997 (D.C. Cir. 1979) ("Because only 'a scheme to defraud' and not actual fraud is required, proof of fraudulent intent is critical."), *cert. denied*, 446 U.S. 982 (1980). In *United States v. Bailey*, 859 F.2d 1265, 1273 (7th Cir. 1988), the court held that there must be sufficient evidence that the

defendant acted with intent to defraud, that is, "willful participation in [the] scheme with knowledge of its fraudulent nature and with intent that these illicit objectives be achieved." (quoting *United States v. Price*, 623 F.2d 587, 591 (9th Cir. 1980), *cert. denied*, 449 U.S. 1016 (1980), *overruled on other grounds by*, *United States v. DeBright*, 730 F.2d 1255 (9th Cir. 1984)), *cert. denied*, 488 U.S. 1010 (1989).

Proof of Intent

"The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *United States v. Schmuck*, 489 U.S. 705, 710 (1989) (quoting *Kann v. United States*, 323 U.S. 88, 95 (1944)); *accord United States v. Coachman*, 727 F.2d 1293, 1302 n.43 (D.C. Cir. 1984) ("The offense of mail fraud demands proof of a scheme to defraud which, at some point, is intentionally furthered by use of the mails.").

"It is not necessary that the scheme contemplate the use of the mails as an essential element." *Pereira v. United States*, 347 U.S. 1, 8 (1954); *Durland v. United States*, 161 U.S. 306, 313 (1896) (proof of specific intent to use the mails on the part of defendants need not be proven). "It is sufficient for the mailing to be 'incident to an essential part of the scheme,' . . . or 'a step in [the] plot' . . . . " *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (citations omitted); *cf. United States v. Diggs*, 613 F.2d 988, 998 (D.C. Cir. 1979).

The gist of the offenses is not the scheme to defraud, but the use of the mails or interstate wire communication. *See United States v. Garland*, 337 F. Supp. 1, 3 (N.D. Ill. 1971); *see also United States v. Gardner*, 65 F.3d 82, 85 (8th Cir. 1995) ("The use of the post office establishment in the execution of the alleged scheme to obtain money by false pretenses is the gist of the offense which the statute denounces, and not the scheme to defraud.") (*quoting Cochran v. United States*, 41 F.2d 193, 197 (8th Cir. 1930)), *cert. denied*, 116 S.Ct. 748 and 116 S.Ct. 1044 (1996); *United States v. Lebovitz*, 669 F.2d 894, 898 (3d Cir. 1982) ("The gist of the offense of mail fraud is the use of mails by someone to carry out some essential element of the fraudulent scheme or artifice."), *cert. denied*, 456 U.S. 929 (1982). Accordingly, each use of the mails (in the case of mail fraud) and each separate wire communication (in the case of wire fraud) constitutes a separate offense, *i.e.*, each mailing and/or wire transmission can constitute a separate count in the indictment. *See, e.g., United States v. Pazos*, 24 F.3d 660, 665 (5th Cir. 1994) (addressing mail fraud); *United States v. Rogers*, 960 F.2d 1501, 1514 (10th Cir. 1992) (holding each use of mails is separate offense), *cert. denied*, 506 U.S. 1035 (1992); *United States v. Castillo*, 829 F.2d 1194, 1199 (1st Cir. 1987) (addressing wire fraud).

Element 3: Proof of Mailings

The mailing or wire communication may be proven by circumstantial evidence. *See, e.g., United States v. Griffith*, 17 F.3d 865, 874 (6th Cir. 1994), *cert. denied*, 115

S.Ct. 149 (1994); *United States v. Bowman*, 783 F.2d 1192, 1197 (5th Cir. 1986) (discussing mailings performed in the course of the bank's customary practices) (*citing United States v. Ledesma*, 632 F.2d 670, 675 (7th Cir.), *cert. denied*, 449 U.S. 998 (1980)); *United States v. Brooks*, 748 F.2d 1199, 1202-03 (7th Cir. 1984) (introduction of envelope). *But see United States v. Hannigan*, 27 F.3d 890, 895 (3d Cir. 1994) (holding defendant's statement that he received check was insufficient to prove check was sent through the mails).

"To constitute a violation of [§ 1341] . . ., it is not necessary to show that [defendants] actually mailed . . . anything themselves; it is sufficient if they caused it to be done. *Pereira v. United States*, 347 U.S. 1, 8 (1954) (citing 18 U.S.C. (Supp. V) § 2(b)); *United States v. Kenofskey*, 243 U.S. 440, 443 (1917) ("Cause" is used "in its well-known sense of bringing about . . . ."); *accord United States v. Diggs*, 613 F.2d 988, 998 (D.C. Cir.) ("One must 'cause' the mails to be used" to satisfy the element of "use of the United States mails 'for the purpose of executing the scheme.'") (quoting *United States v. Maze*, 414 U.S. 395, 400 (1974) (quoting *Kann v. United States*, 323 U.S. 88, 94 (1944), *cert. denied*, 446 U.S. 982 (1980). The government needs show only that the defendant "caused" the mailing by acting "with knowledge that the use of the mails follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended." *Pereira*, 347 U.S. at 8-9.

"'[I]nnocent' mailings - ones that contain no false information - may supply the mailing element." *United States v. Schmuck*, 489 U.S. 705, 715 (1989) (citing *Parr v. United States*, 363 U.S. 370, 390 (1960)). Moreover, the elements of mail fraud may be satisfied where the mailings have been routine. Mailings that may lead to the uncovering of the fraudulent scheme may also supply the mailing element of the mail fraud offense. *Id.* ("The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud.").

Use of Private Carriers

To combat telemarketing fraud, Congress amended the mail fraud statute to broaden its application to include private or commercial interstate carriers in addition to the United States Postal Service. *See* Senior Citizens Against Marketing Scams Act of 1994, PUB.L. No. 103-322, Title XXV, § 25006, and Title XXXIII, § 330016(1)(H), 108 Stat. 2087, 2147 (enacted as part of the Violent Crime Control and Law Enforcement Act of 1994); *see also* Cong. Rec. S2654-61 (March 10, 1993) (statement of Sen. Hatch) and S10017-19 (July 30, 1993) (statement of Sen. Hatch).

An interstate carrier typically entails the larger delivery service companies. *See generally* Peter J. Henning, *Maybe it Should Just be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C.L. Rev. 435, 473-77 (1995) ("The large delivery service companies, such as Federal Express and United Parcel Service,

are clearly interstate carriers, but small entities, such as local messenger services, are not as easily categorized.").

Affiliated Offenses

The mail fraud and wire fraud statutes are becoming important tools in prosecutions of RICO violations, money laundering, financial institution fraud, procurement fraud, and telemarketing fraud. Mail and wire fraud violations that support prosecutions in these areas can result in more severe sanctions and can form the basis for civil or criminal forfeiture.

Proof Chart

Element	Synopsis of Evidence
Scheme to defraud	
Intent	
Use of the mail	

18 U.S.C. § 1343—Wire Fraud

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Elements

The elements of wire fraud under Section 1343 directly parallel those of the mail fraud statute, but require the use of an interstate telephone call or electronic communication made in furtherance of the scheme. *United States v. Briscoe*, 65 F.3d 576, 583 (7th Cir. 1995) (*citing United States v. Ames Sintering Co.*, 927 F.2d 232, 234 (6th Cir. 1990) (per curiam)); *United States v. Frey*, 42 F.3d 795, 797 (3d Cir. 1994) (holding wire fraud is identical to mail fraud statute except that it speaks of communications transmitted by wire).

To establish a violation of 18 U.S.C. § 1343, the government must prove four elements:

(1) that the defendant voluntarily and intentionally devised or participated in a scheme to defraud another out of money;

(2) that the defendant did so with the intent to defraud;

(3) that it was reasonably foreseeable that interstate wire communications would be used; and

(4) that interstate wire communications were in fact used

See also, e.g., United States v. Profit, 49 F.3d 404, 406 n.1 (8th Cir. 1995) (*citing* Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit 6.18.1341 (West 1994)), *cert. denied*, 115 S.Ct. 2289 (1995); *United States v. Maxwell*, 920 F.2d 1028, 1035 (D.C. Cir. 1990) ("Wire fraud requires proof of (1) a scheme to defraud; and (2) the use of an interstate wire communication to further the scheme.").

Element 1: "Scheme to Defraud"

The wire fraud statute was patterned after the mail fraud statutes. *United States v. Lemon*, 941 F.2d 309, 316 (5th Cir. 1991); *United States v. Castillo*, 829 F.2d 1194, 1198 (1st Cir. 1987). Thus, the same principles apply in defining "scheme to defraud" for mail and wire fraud prosecutions. *See Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) ("The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here."); *United States v. Lemire*, 720 F.2d 1327, 1334-35 n.6 (D.C. Cir. 1983) ("The requisite elements of 'scheme to defraud' under the wire fraud statute [§ 1343] and the mail fraud statute [§ 1341], are identical. Thus, cases construing mail fraud apply to the wire fraud statute as well."), *cert. denied*, 467 U.S. 1226 (1984).

See above, Mail Fraud, "Scheme to Defraud"

"Scheme"

See above, Mail Fraud, "Scheme"

Proving the Scheme

To sustain a conviction the government must prove the existence of a scheme; it is not required, however, to prove all details or all instances of allegedly illicit conduct. *See, e.g., United States v. Stull*, 743 F.2d 439, 442 n.2 (6th Cir. 1984) ("It is well established that proof of every allegation is not required in order to convict; the government need only prove that the scheme to defraud existed."), *cert. denied*, 470 U.S. 1062 (1985). "All that is required is that [the defendant has] knowingly and willingly participated in the scheme; she need not have performed every key act herself." *United States v. Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990). The "evidence need only show that defendant was a 'knowing and active participant' in a scheme to defraud and

that the scheme involved interstate wire communications." *Id.* (quoting *United States v. Wiehoff*, 748 F.2d 1158, 1161 (7th Cir. 1984)).

Element 2: Intent

See above, Mail Fraud, "Intent"

Proof of Intent

As in the case of mail fraud, a wire transmission may be considered to be for the purpose of furthering a scheme to defraud if the transmission is incident to the accomplishment of an essential part of the scheme. *United States v. Mann*, 884 F.2d 532, 536 (10th Cir. 1984). Moreover, it is not necessary to show that the defendant directly participated in the transmission, where it is established that the defendant caused the transmission, and that such use was the foreseeable result of his acts. *United States v. Gill*, 909 F.2d 274, 277-78 (7th Cir. 1990); *United States v. Jones*, 554 F.2d 251, 253 (5th Cir.), *cert. denied*, 434 U.S. 866 (1977); *United States v. Wise*, 553 F.2d 1173 (8th Cir. 1977).

The gist of the offenses is not the scheme to defraud, but the use of the mails or interstate wire communication. *See United States v. Garland*, 337 F. Supp. 1, 3 (N.D. Ill. 1971); *see also United States v. Gardner*, 65 F.3d 82, 85 (8th Cir. 1995) ("The use of the post office establishment in the execution of the alleged scheme to obtain money by false pretenses is the gist of the offense which the statute denounces, and not the scheme to defraud.") (*quoting Cochran v. United States*, 41 F.2d 193, 197 (8th Cir. 1930)), *cert. denied*, 116 S.Ct. 748 and 116 S.Ct. 1044 (1996); *United States v. Lebovitz*, 669 F.2d 894, 898 (3d Cir. 1982) ("The gist of the offense of mail fraud is the use of mails by someone to carry out some essential element of the fraudulent scheme or artifice."), *cert. denied*, 456 U.S. 929 (1982). Accordingly, each use of the mails (in the case of mail fraud) and each separate wire communication (in the case of wire fraud) constitutes a separate offense—*i.e.*, each mailing and/or wire transmission can constitute a separate count in the indictment. *See, e.g., United States v. Pazos*, 24 F.3d 660, 665 (5th Cir. 1994) (addressing mail fraud); *United States v. Rogers*, 960 F.2d 1501, 1514 (10th Cir.) (holding each use of mails is separate offense), *cert. denied*, 506 U.S. 1035 (1992); *United States v. Castillo*, 829 F.2d 1194, 1199 (1st Cir. 1987) (addressing wire fraud).

Element 3: Foreseeable Wire Transmission Would Be Used

See above Element 2

Element 4: Proof of Transmission

The mailing or wire communication may be proven by circumstantial evidence. *See, e.g., United States v. Griffith*, 17 F.3d 865, 874 (6th Cir. 1994), *cert. denied*, 115 S.Ct. 149 (1994).

See above, Mail Fraud, "Proof of Mailing"

Use of Private Carriers

See above, Mail Fraud, "Use of Private Carriers"

Interstate and Foreign Commerce

The statute requires a transmission in interstate or foreign commerce. *See United States v. Mann*, 884 F.2d 532, 536 (10th Cir. 1989); *see also United States v. Van Cawenberghe*, 827 F.2d 424, 430 (9th Cir. 1987) (holding telex transmission was in interstate commerce because its path included the interstate transmission from New York to Los Angeles), *cert. denied*, 484 U.S. 1024 (1988). Accordingly, an intrastate transmission does not constitute an offense. *See Boruff v. United States*, 310 F.2d 918 (5th Cir. 1962).

In 1956 the wire fraud statute was amended to include transmissions in "foreign commerce." PUB.L. NO. 84-688, 70 Stat. 523 (1956). Generally, the term "foreign commerce" is defined as including "commerce with a foreign country." 18 U.S.C. § 10; *see generally*, *United States v. Goldberg*, 830 F.2d 459, 461-65 (3d Cir. 1987) (discussing wire fraud arising from the transfer of funds by wire from Montreal, Canada to Nassau, Bahamas caused by telephone calls that originated from the United States), and 830 F.2d at 468 n.1 (J. Sloviter, dissenting in part and concurring in part) ("[T]he examples in the legislative history of 'foreign commerce' to which the amended provision was to apply all included transmissions between a foreign country and the United States.") (citing S. REP. NO. 1873, 84th Cong., 2d Sess. 2-3 (1956); H.R.Rep. No. 2385, 84th Cong., 2d Sess. 1-2 (1956)).

Proof Chart

Element	Synopsis of Evidence
Scheme to defraud	
Intent	
Foreseeable use of wire communication	
Use of wire communication	

MAJOR FRAUD AGAINST THE UNITED STATES

18 U.S.C. § 1031

Section 1031 prohibits procurement fraud involving contracts or subcontracts with the United States valued at $1 million or more and was enacted in response to Congress' continued concern over the widespread scope of procurement fraud against the United States. There are scant reported decisions construing § 1031. For the purpose of interpreting this section, one must consult the case history and legislative history of § 1031 and cases discussing the analogous mail, wire, and bank fraud statutes, 18 U.S.C. §§ 1341, 1343, and 1344.

Section 1031 states in relevant part:

> *a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent--*
>
> *1) to defraud the United States; or*
>
> *2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises,*
>
> *in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more . . .*

The statute has been upheld against vagueness attacks. *United States v. Nadi*, 996 F.2d 548, 550 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 347 (1993); *United States v. Frequency Electronics*, 862 F. Supp. 834 (E.D.N.Y. 1994).

A defendant can be charged with a separate violation of the Major Fraud Act for each false claim he submits to the Government, notwithstanding his contention that he should be charged only with a single count predicated on his devising an overall scheme. The statute criminalizes each knowing execution of a fraudulent scheme, and not simply devising the scheme itself. *United States v. Sain*, C.A.3 (Pa.) 1998, 141 F.3d 463, *cert. denied*, 525 U.S. 908 (1998).

The Act also establishes a "bounty-hunter" provision under § 1031(g), which allows payments from the Department of Justice to persons who furnish information under the Act. However, to date, no fund has been authorized and no payments have been awarded.

Elements

To establish fraud under 18 U.S.C. § 1031, the government must prove four elements:

1) Defendant executed or attempted to execute a scheme or artifice with the intent to defraud the United States or to obtain money or property from the United States by false pretenses or representations.

2) Defendant did so knowingly.

3) Defendant attempted to execute or executed the scheme or artifice in a procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there was a prime contract with the United States.

4) The value of the contract or subcontract was $1 million or more.

Element 1: Defendant executed or attempted to execute a scheme or artifice with the intent to defraud the United States or to obtain money or property from the United States by false pretenses or representations

There are no known reported decisions construing this element. However, the legislative history reveals that:

> *[t]he phrase "scheme or artifice" should be interpreted in the same manner as the phrase is interpreted under the mail and wire fraud statutes, 18 U.S.C. 1341 and 1343. According to well-established case law, the phrase "is to be interpreted broadly." McNally v. United States, 107 S.Ct. 2875, 2879-80 (1987).*

S. REP. NO. 100-503, 100th Cong., 2d Sess. 11 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5969, 5975.

To establish a violation of § 1031, it is not necessary that the Government prove that the defendant successfully executed or attempted to execute the scheme to defraud the United States or to obtain money by false pretenses. The gist of the procurement fraud prohibited by § 1031, like its mail, wire, and bank fraud counterparts, is the execution, or the attempt to execute, the scheme or artifice with the requisite criminal intent. *See United States v. Kelley*, 929 F.2d 582 (10th Cir.), *cert. denied*, 112 S.Ct. 341 (1991).

The phrase "false or fraudulent pretenses, representations, or promises" includes actual, direct false statements as well as half-truths, and includes the knowing concealment of facts that are material or important to the matter in question that were

made or used with the intent to defraud. *See United States v. Sawyer*, 799 F.2d 1494, 1502 (11th Cir. 1986), *cert. denied*, 479 U.S. 1069 (1987).

Element 2: Defendant did so knowingly

There are no known reported decisions construing this element. But it has been held in construing analogous statutes that the Congress intended that the "'knowing' standard include[ ] the concept of willful blindness or deliberate ignorance as outlined in such decisions as *U.S. v. Jewell*, 532 F.2d 697 (9th Cir. 1976); *U.S. v. Jacobs*, 470 F.2d 270 (2d Cir. 1972) *cert. denied sub nom*; *Lavelle v. U.S.*, 414 U.S. 821 (1973) . . . As such it is the normal 'knowing' standard used in many Federal and state criminal statutes (*See e.g.*, 18 U.S.C. § 1344, 18 U.S.C. § 1341, 18 U.S.C. § 1028)." H.R. REP. NO. 100-610, 100th Cong., 2d Sess. 6 (1988).

Element 3: Defendant attempted to execute or executed the scheme or artifice in a procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there was a prime contract with the United States

This element is self-explanatory. To violate the statute, the defendant must act as a prime contractor, subcontractor, or supplier on a government contract. The prohibition of the execution or attempted execution of a fraud scheme "in any procurement of property or services" applies to those involved in the procurement of such property or services.

Element 4: The value of the contract or subcontract was $1 million or more

Section 1031 conditions its applicability to prime contractors or subcontractors by stating that the statute pertains to them only "if the value of the contract, subcontract, or any constituent part thereof, for such property or services is $1,000,000 or more." The two Circuits that have interpreted the jurisdictional amount requirement are split as to whether $1 million is in reference only to the value of the contract which is the subject of the fraud, or to any related prime contract, subcontract, or constituent part. The Second Circuit stated in dicta that for the purpose of § 1031(a) analysis, "the value of the contract is determined by looking to the specific contract upon which the fraud is based." *Nadi*, 996 F.2d 548, 551 (2d Cir.), *cert. denied*, 114 s. Ct. 347 (1993). However, the Fourth Circuit holds that the statute's jurisdictional requirement is established so long as the prime contract with the United States or any part thereof is worth $1 million, irrespective of the value of the contract which is the subject of the fraud. *United States v. Brooks*, 111 F.3d 365, 369 (4th Cir. 1997).

Neither the statute nor the legislative history provides a definition for "contract" or "subcontract." However, the Federal Acquisition Regulation (FAR), the regulation which prescribes policies and procedures for the acquisition of goods and services by all Federal executive agencies, defines each term broadly. *See* 48 C.F.R. § 2.101 (1991); 48 C.F.R. § 44.101 (1991).

Penalty and Remedy Provisions of § 1031

Defendants convicted under § 1031 can be fined not more than $1,000,000, or imprisoned not more than 10 years, or both. The fine imposed for an offense under this section may exceed the maximum otherwise provided by law, if such fine does not exceed $5,000,000 and the gross loss to the Government or the gross gain to a defendant is $500,000 or greater; or the offense involves a conscious or reckless risk of serious personal injury. The maximum fine imposed upon a defendant for a prosecution including a prosecution with multiple counts under this section shall not exceed $10,000,000.

A court may also impose any other sentences available under Title 18, including without limitation a fine up to twice the amount of the gross loss or gross gain involved in the offense pursuant to 18 U.S.C. § 3571(d).

In determining the amount of the fine, the court considers the factors set forth in 18 U.S.C. §§ 3553 and 3572, and the factors set forth in the guidelines and policy statements of the United States Sentencing Commission, including the need to reflect the seriousness of the offense, including the harm or loss to the victim and the gain to the defendant; whether the defendant previously has been fined for a similar offense; and any other pertinent equitable considerations.

For more on the Act, *see* S. MacKay, *The Major Fraud Act After Seven Years: an Update*, 64 FEDERAL CONTRACTS REPORT 1 (Sept. 25, 1995, Bureau of National Affairs).

Proof Chart

Element	Synopsis of Evidence
Scheme to defraud or to obtain money or property	
Defendant acted knowingly	
Defendant was a prime contractor or subcontractor	
Contract value of at least $1 million	

PROCUREMENT INTEGRITY ACT

41 U.S.C. § 423, et. seq.

§ 423. Restrictions on disclosing and obtaining contractor bid or proposal information or source selection information

Purpose

The purpose of the Procurement Integrity Act ("the Act") is to prohibit the improper disclosure of confidential information that might give a contractor an unfair advantage over competitors. The goal of the Act is to assure a level playing field in government contracting. The Act regulates the conduct of contractors and federal government employees who are involved in government contracting.[10] The Act prohibits:

- government employees from disclosing procurement sensitive information;
- government employees and contractors from improperly obtaining procurement sensitive information;
- government employees and contractors from discussing employment opportunities during the course of a procurement; and
- under certain circumstances, former government employees from accepting compensation from contractors.

These four prohibitions are discussed below.

Disclosing procurement information in violation of subsection (a)

Subsection (a) of § 423 prohibits government employees and persons acting for the government from disclosing procurement sensitive information.[11] The following is the Act's pertinent language:

(1) A person described in paragraph (2) shall not, other than as provided by law, knowingly disclose contractor bid or proposal information or source

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[10] The regulations implementing the Act can be found at 48 CFR 3.104-4 and FAR 3.104.

[11] Subsection (h) of the Act has exceptions to this prohibition, and it authorizes the disclosure of procurement information under narrowly defined circumstances, such as disclosure and receipt of information after the cancellation of a procurement when the government does not intend to resume the procurement.

selection information before the award of the Federal agency procurement contract to which the information relates.

(2) Paragraph (1) applies to any person who—

(A) is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and

(B) by virtue of that office, employment, or relationship has or had access to contractor bid or proposal information or source selection information.

Subsection (a) does not apply to all persons. It applies only to present and former federal government officials and other persons acting on behalf of the federal government. The Act defines "official" as an officer (5 U.S.C. § 2104), an employee, (5 U.S.C. § 2105), or a member of the uniformed services (5 U.S.C. § 2101(3)). *See* 41 U.S.C. § 423(f)(7) (2000).

Elements of subsection (a)

To prove a violation of subsection (a), the government must prove the following elements:

Element 1: The defendant is a person described in paragraph (2) of subsection (a).

To prove this element, the defendant must be a present or former official of the United States or a person who was advising or acting for the United States on a federal procurement. *See* FAR 3.104-1 for the definition of official.

Element 2: The defendant had access to contractor bid or proposal information or source selection information.

The defendant must have had access to "contractor bid or proposal information" or to "source selection information" by virtue of his/her employment, office or relationship to the procurement process.

The Act defines contractor bid or proposal information and source selection information at § 423(f)(1)-(2).

Contractor bid or proposal information means information not accessible to the public such as the following: cost or pricing data, indirect costs and direct labor rates, proprietary information about manufacturing processes, operations, or techniques, and information marked by the contractor as "contractor bid or proposal information.

§ 423(f)(1).

Source selection information means information not available to the public such as the following: bid prices, proposed costs or prices from bidders, source selection and technical evaluation plans, technical evaluations, cost or price evaluations, competitive range determinations, rankings of bids, reports of source selection panels, and other information marked as "source selection" based on a determination that its disclosure would jeopardize the procurement. § 423(f)(2).

Regulations regarding this element can be found in FAR 2.101 and FAR 3.104. FAR 2.101 contains definitions which expound on various terms used in the Act. For example, FAR 2.101 gives a lengthier definition of contracting officer. FAR 3.104 contains additional definitions and implements the Act by dictating specific procedures regarding disqualification of an agency official and actions to be taken in cases where an agency official has been offered unlawful compensation from a prospective contractor.

Source selection information includes everything from bid prices to bid rankings, basically "any information prepared for use by a federal agency for the purpose of evaluating a bid or proposal to enter into a federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly." § 423(f)(2).

Element 3: The defendant knowingly disclosed such information.

The defendant must have "knowingly" disclosed the information. The Act does not define "knowingly." There are many federal statutes using the word "knowingly," and although there is no single, uniform definition of the term, the general rule is that "knowingly," when used in a statute with criminal penalties, means knowledge of the facts constituting the crime. It does not mean that the defendant had knowledge of the law or specific intent to break a law. *See, e.g., Bryan v. United States*, 514 U.S. 184 (1998); *Staples v. United States*, 511 U.S. 600 (1994); *United States v. Int'l Minerals & Chem., Corp.*, 402 U.S. 558 (1971). As used in the Procurement Integrity Act, the prosecution must prove that the defendant knew that he was disclosing information and that the information was either bid or proposal information or source selection information. It does not mean that the prosecution must prove that the defendant specifically knew that he was breaking the law.

Element 4: The defendant disclosed the information before the award of the federal agency procurement contract to which the information relates.

Element 5: The procurement was a competitive procurement.

Section 423(a)(1) provides that the defendant must have disclosed the information "before the award of a Federal agency procurement contract."

(Underscoring added.) Section 423(f)(4) defines the term "Federal agency procurement" as meaning an acquisition using "competitive procedures." Thus, the prohibition against disclosing bid, proposal or source selection information applies only to competitive procurements, not to sole source procurements.

Proof Chart

Element	Synopsis of Evidence
Defendant is a person described in § 423(a)(2).	
Defendant had access to contractor bid or proposal information or source selection information.	
Defendant knowingly disclosed the information.	
Defendant disclosed information before the award of the contract.	
Procurement was a competitive procurement.	

Obtaining information in violation of subsection (b)

Subsection § 423(b) prohibits persons from obtaining procurement sensitive information. It has the following key language:

> *A person shall not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.*

Subsection (b) applies to any person, not just to federal government employees. Under 1 U.S.C. § 1, the word "person" includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals. This definition embraces virtually any legal entity capable of being sued.

Elements of subsection (b)

To prove a violation of subsection (b), the government must prove the following elements.

Element 1: Defendant knowingly obtained information.

The defendant must have "knowingly" obtained the confidential procurement information. As mentioned above, the general rule is that "knowingly" means knowledge of the facts constituting the crime. It does not mean that the defendant had knowledge of the law or specific intent to break a law. *See, e.g., Bryan*, 514 U.S. at 184; *Staples*, 511 U.S. at 600; *Int'l Minerals & Chem., Corp.*, 402 U.S. at 558. As used in the Procurement Integrity Act, the prosecution must prove that the defendant knew that he was obtaining information and that the information was either bid or proposal information or source selection information. It does not mean that the prosecution must prove that the defendant knew that he was breaking the law.

Element 2: Contractor bid or proposal information or source selection information

This element is essentially the same as the analogous element in subsection (a), above, and the same principles apply.

Element 3: Before the award of the federal agency procurement contract to which the information relates.

Element 4: The procurement was a competitive procurement.

Section 423(b) provides that the defendant must have obtained the information "before the award of a Federal agency procurement contract." (Underscoring added.) Section 423(f)(4) defines the term "Federal agency procurement" as meaning an acquisition using "competitive procedures." Thus, the prohibition against obtaining bid, proposal or source selection information applies only to competitive procurements, not to sole source procurements.

Proof Chart

Element	Synopsis of Evidence
Defendant knowingly obtained information.	
Information was a competitor's bid or proposal information or other source selection information.	
Defendant obtained the information before award of the contract.	
Procurement was a	

Seeking and soliciting employment in violation of subsection (c)

Key language

If an agency official who is participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold contacts or is contacted by a person who is a bidder or offeror in that Federal agency procurement regarding possible non-federal employment for that official, the official shall—

(A) promptly report the contact in writing to the official's supervisor and to the designated agency ethics official (or designee) of the agency in which the official is employed; and

(B)(i) reject the possibility of non-Federal employment; or (ii) disqualify himself or herself from further personal and substantial participation in that Federal agency procurement . . . .

Subsection (c) limits agency procurement officials from seeking employment in the private sector and it limits contractors from soliciting such officials for private-sector employment.

If a government official participates "personally and substantially" in a procurement action exceeding the simplified acquisition threshold,[12] and if the official contacts a bidder or offeror about non-federal employment, then the official must report the contact to his supervisor and to the designated agency ethics officer and either reject the possible non-federal employment or disqualify himself from further personal and substantial participation in the procurement.
§ 423(c)(1)(A)-(B).

Similarly, if a government official participates "personally and substantially" in a procurement action exceeding the simplified acquisition threshold, and if a bidder or offeror contacts the official about non-federal employment, then the official must report the contact to his supervisor and to the designated agency ethics officer and either reject the possible non-federal employment or disqualify himself from further personal and substantial participation in the procurement. § 423(c)(1)(A)-(B).

If a government official fails to report a contact, then the official violates the Act, even if the official rejects the possibility of employment or disqualifies himself. Under the language of the subsection (c), it appears that a failure to report is *per se* a violation

[12] The simplified acquisition threshold is currently $100,000, with certain exceptions set forth at FAR 2.101.

even if a government official immediately rejects the possibility of employment or disqualifies himself from further involvement with the procurement action.

Subsection (c) also applies to contractors. If a bidder or offeror engages in employment discussions with a government official knowing that the official has not complied with the reporting and disqualification requirements of subsection (c), then the contractor violates subsection (c).

Penalties

If a government official knowingly fails to comply with subsection (c), then the official is subject to the criminal and civil penalties and administrative actions set forth in §423(e). Similarly, if a contractor engages in employment discussions with a government official knowing that the official has not complied with the reporting and disqualification requirements of subsection (c), then the contractor is subject to the criminal and civil penalties and administrative actions of subsection (e).

Elements of subsection (c)

To prove a violation of subsection (c), the prosecution must prove the following elements:

Element 1: The procurement action exceeded the simplified acquisition threshold (currently $100,000, with certain exceptions).

Element 2: The government official participated "personally and substantially" in a procurement action exceeding the simplified acquisition threshold.

Element 3: The official contacted a bidder or offeror about non-federal employment, or a bidder or offeror contacted the government official about non-federal employment.

Element 4: The government official did not report the contact in writing to the official's supervisor and to the agency's designated ethics officer;

OR

The government official did not reject the possibility of non-federal employment and did not disqualify himself from further personal and substantial participation in the procurement.

Element 5: The defendant acted knowingly.

As discussed above, "knowingly" means knowledge of the facts constituting the crime. It does not mean that the defendant had knowledge of the law or specific intent

to break a law. *See, e.g., Bryan*, 514 U.S. at 184; *Staples*, 511 U.S. at 600; *Int'l Minerals & Chem., Corp.*, 402 U.S. at 558.

Element 6: The procurement was a competitive procurement.

Section 423(c) applies only to an official who participates personally and substantially in "a Federal agency procurement"." (Underscoring added.) Section 423(f)(4) defines the term "Federal agency procurement" as meaning an acquisition using "competitive procedures." Thus, the prohibition in Section 423(c) applies only to competitive procurements, not to sole source procurements.

Proof Chart

Element	Synopsis of Evidence
Procurement action exceed the simplified acquisition threshold.	
Government official participated personally and substantially in the procurement.	
Contact about non-federal employment.	
Government official did not report the contact OR did not reject the employment opportunity and did not disqualify himself from the procurement action.	
The defendant acted knowingly.	
Procurement was a competitive procurement.	

Accepting compensation in violation of subsection (d)

The Act at subsection (d)(1) has provisions that make it unlawful for a former government employee to accept compensation from a contractor under certain defined circumstances. The specific language of subsection (d) should be consulted. In general, subsection (d) provides that if a former government official participated in a contracting action exceeding a value of $10 million to a contractor, then the former

official may not accept compensation from the contractor for a period of one year after the official participated in the contracting action.

Subsection (d) does not prohibit a former government official from accepting compensation from a division or affiliate of a contractor provided that the division or affiliate does not produce the same or similar products or services as the contractor. § 423(d)(2).

A former official who knowingly accepts compensation in violation of this subsection is subject to the penalties and administrative actions as set forth in subsection (e) of the Act. § 423(d)(3).

The Act also provides that if a contractor knowingly pays compensation in violation of subsection (d), then the contractor is subject to the penalties and administrative actions set forth in subsection (e). § 423(d)(4).

Elements of subsection (d)

To prove a violation of subsection (d), the prosecution must prove the following elements:

Element 1: Defendant was a former official of a federal agency

An "official" is an officer, as defined in 5 U.S.C. § 2104, an employee, as defined in 5 U.S.C. § 2105, or a member of the uniformed services, as defined in 5 U.S.C. § 2101(3). § 423(f)(7).

Element 2: Defendant participated in a procurement action affecting the contractor.

Element 3: Defendant accepted compensation from the contractor as an employee, officer, director, or consultant of the contractor.

The Act defines four types of relationships between the contractor and the former federal official: (i) employee; (ii) officer; (iii) director; or (iv) consultant. This definition is broad enough to cover almost all business employment relationships.

The Act does not define "compensation." However, the term should be broadly construed to effectuate the purpose of the Act. At FAR 3.104-1, "compensation" is defined as "wages, salaries, honoraria, commissions, professional fees, and any other form of compensation, provided directly or indirectly for services rendered. Compensation is provided indirectly if it is paid to an entity other than the individual, specifically in exchange for services provided by the individual."

Element 4: Defendant accepted the compensation within a period of one year after the former official participated in the procurement action.

Proof Chart

Element	Synopsis of Evidence
Defendant was a former federal government official.	
Defendant participated in a procurement action involving the contractor.	
Defendant accepted compensation from the contractor as an officer, director, employee or consultant.	
Defendant accepted the compensation within a year of participating in the procurement action.	

Penalties and administrative actions

The Act provides for criminal and civil penalties and administrative action. If a defendant is convicted of violating subsections (a) or (b) of the Act, then he can be imprisoned for up to five years and fined as provided for in Title 18.

If the defendant violates subsections (a), (b), (c) or (d), then the Attorney General can sue the defendant and recover a civil penalty of up to $50,000 for each violation, plus twice the amount of compensation that the individual received or offered for the prohibited conduct. If an entity violates the Act, the entity can be required to pay a civil penalty not exceeding $500,000 for each violation, plus twice the amount of compensation that the entity gave or received for the misconduct.

The Act does not expressly permit a private cause of action. At the time of this writing, we have found only one case addressing whether or not there is an implied right to bring a private action under the Act, *Lockheed Martin Corporation v. The Boeing Company, et al.*, M.D. Fla. No. 6:03-cv-796-Orl-28KRS. On October 28, 2003, the court in that case issued an unpublished "Order" holding that there is no implied private right of action under the factors set forth by the Supreme Court in *Alexander v. Sandoval*, 532 U.S. 275 (2001).

With regard to administrative actions against an individual or entity, the statute explicitly states that a violation of subsections (a), (b), (c), or (d) affects the present responsibility of the government contractor or subcontractor therefore providing a basis for suspension or debarment. § 423(e)(3)(c). The Act also permits the government to rescind a contract and to recover the amount expended under the contract, in addition to any penalty prescribed by law.

THEFT OF TRADE SECRETS

18 U.S.C. § 1832

(a) Whoever, with intent to convert a trade secret, that is related to or included in a product that is produced for or placed in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret, knowingly -

(1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains such information;

(2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys such information;

(3) receives, buys, or possesses such information, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;

(4) attempts to commit any offense described in paragraphs (1) through (3); or

(5) conspires with one or more other persons to commit any offense described in paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy,

shall, except as provided in subsection (b), be fined under this title or imprisoned not more than 10 years, or both.

(b) Any organization that commits any offense described in subsection (a) shall be fined not more than $5,000,000

Elements

To establish a violation of 18 U.S.C. § 1832, the government must prove six elements:

1) the information was a trade secret;

2) the defendant knew that the information was a trade secret;

3) the trade secret was used in interstate commerce;

4) the defendant stole, or without authorization of the owner, obtained, destroyed or conveyed information;

5) the defendant intended to convert the trade secret to the economic benefit of someone other than the owner; and

6) the defendant knew or intended that the owner of the trade secret would be injured.

Element 1: The information was a trade secret.

The *sine qua non* element of a violation of § 1832 is that the misappropriated information must fit the definition of a trade secret set forth at 18 U.S.C. § 1839. The statute broadly defines "trade secret" as meaning all types of information, however stored or maintained, which the owner has taken reasonable measures to keep secret and which has independent economic value. 18 U.S.C. § 1839 provides in pertinent part:

> *(3) the term "trade secret means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if-*
>
> *a. the owner thereof has taken reasonable measures to keep such information secret; and*
>
> *b. the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public.*

Unlike patents, which must be both novel and a step beyond "prior art," trade secrets must be only "minimally novel." *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974). Although it is necessary that a trade secret have some content that is not known generally and that sets it apart from what is generally known, the novelty need not rise to the level necessary for a patent.

The definition of the term trade secret does not include general knowledge, skill or abilities. Therefore, employees, for example, who change employers or start their own companies cannot be prosecuted based on an assertion that they were exposed to a trade secret while employed, unless the government can establish that they stole or misappropriated a particular trade secret. The government cannot prosecute an individual for taking advantage of the general knowledge and skills or experience that he or she obtains or comes by during his or her tenure with a company.

The *sine qua non* of information constituting a trade secret is that it is not publicly known. The trade secret must derive "independent economic value . . . from not being generally known to . . . the public." 18 U.S.C. § 1839(3)(B). Whether the information was secret before it was obtained by the defendant is a question of fact.

Every part of the information need not be completely confidential to qualify for protection as a trade secret. A trade secret can include a combination of elements that are in the public domain if the trade secret constituted a unique, "effective, successful and valuable integration of the public domain elements." *Rivendell Forest Prods. Ltd. v. Georgia-Pacific Corp.*, 28 F.3d 1042, 1046 (10th Cir. 1994).

Trade secrets are also fundamentally different from other forms of intellectual property in that the owner of a trade secret must take reasonable measures under the circumstances to keep the information confidential. 18 U.S.C. § 1839(3)(A). The extent of the security measures taken by the owner of the trade secret need not be absolute, but must be reasonable under the circumstances, depending on the facts of the specific case. *See e.g.*, *Pioneer Hi-Bred Int'l v. Holden Found Seeds*, 35 F.3d 1226, 1235 (8th Cir. 1994); *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 848-49 (10th Cir. 1993). "Reasonable efforts" can include advising employees of the existence of a trade secret, limiting access to the information to a "need to know basis," requiring employees to sign confidentiality agreements. *MAI Sys. Corp. v. Peak Computer*, 991 F.2d 511, 521 (9th Cir. 1993). The prosecutor must be able to establish that the security measures used by the victim to protect the trade secret were commensurate with the value of the trade secret.

Element 2: The defendant knew that the information was a trade secret.

The government must prove that the defendant "knowingly" stole or misappropriated a trade secret. This means that the government must prove that the defendant knew or had a firm belief that the information he or she was taking was proprietary. Generally, under criminal statutes covering the theft of tangible property, the government must prove that the thief knew that the object he stole was property that he had no lawful right to convert to his personal use.

Applying this same principle to this statute, to convict the defendant, the government must establish that the defendant was aware or substantially certain that he was misappropriating a trade secret. Thus, a person who takes a trade secret because of ignorance, mistake or accident cannot be prosecuted under § 1832. In some cases a defendant may expressly acknowledge that he knew that the information was a trade secret. However, it is more often the case that the defendant's intent is proven indirectly by inference from the relevant facts and circumstances. In most cases, this element of *scienter* should not be a significant barrier to legitimate and warranted prosecutions. Most companies go to considerable pains to protect their trade secrets. Documents are marked proprietary; security measures put in place; and employees often sign confidentiality agreements to ensure that the theft of intangible information is prohibited in the same way that the theft of physical items are protected.

Element 3: The trade secret was used in interstate commerce.

This element requires the government to prove that the trade secret was "related to or included in a product that is produced for or placed in interstate or foreign commerce." 18 U.S.C. § 1832. In cases where the trade secret is related to a product actually being manufactured and sold, this element is easily established by evidence of interstate sales. Where the trade secret relates to a product in research and development, proof is more difficult. However, if the trade secret is related to a product still being developed, but that product will ultimately be sold in interstate commerce, then those facts may be sufficient to satisfy this element.

Element 4: The defendant stole, or without authorization of the owner, obtained, destroyed or conveyed information.

The fourth essential element of a criminal prosecution under 18 U.S.C. § 1832 is that the defendant stole, or without authorization obtained, destroyed or conveyed the trade secret without the owner's authorization. The type of acts which are prohibited include traditional instances of theft, *i.e.*, where the object of the crime is physically removed from the owners possession, and less traditional methods of misappropriation and destruction, including unauthorized copying or communicating of the trade secret. This means that although the original property never leaves the custody or control of the owner, the unauthorized duplication or misappropriation may effectively destroy the value of what is left with the rightful owner.

The government must prove that the defendant acted "without authorization" from the owner. As used in this section, "owner with respect to a trade secret, means the person or entity in whom or in which rightful or equitable title to, or license in, the trade secret is reposed." 18 U.S.C. § 1839(4). In appropriate cases, the term includes assignees of the intellectual property. The question is whether the defendant had the consent of the owner to obtain, destroy or convey the trade secret. Even if an employee has authorization from his employer to obtain a trade secret during the regular course of employment, he can still violate § 1831 if he "conveys" or "communicates" it to others without his employer's permission.

Element 5: The defendant intended to convert the trade secret to the economic benefit of someone other than the owner.

Under § 1832, the government must prove that the act of misappropriating the trade secret was intended for the economic benefit of a person other than the rightful owner (which can be the defendant or some other person or entity). Therefore, a person who misappropriates a trade secret, but who does not intend for anyone to gain economically from the theft, cannot be prosecuted under § 1832.

Element 6: The defendant knew or intended that the owner of the trade secret would be injured.

In addition to demonstrating that the defendant both knew the information taken was proprietary and intended that the misappropriation economically benefit someone other than the rightful owner, the government must also prove that the defendant intended to "injure" the owner of the trade secret. However, this provision does not require the government to prove malice or evil intent, but merely that the actor knew or was aware to a practical certainty that his conduct would cause some disadvantage to the rightful owner.

Proof Chart

Element	Synopsis of Evidence	Witnesses and/or Documents
Trade secret information		
Defendant knew that the information was trade secret		
Information was used in interstate commerce		
Defendant stole or obtained information without owner's authorization		
Defendant intended to convert the information		
Defendant knew that the owner of the information would be injured		

APPENDIX A

REMEDIES PLAN FORMAT

NAME OF TARGET OR DEFENDANT[13]
SAF/GCR FILE NUMBER
AFOSI CASE NUMBER

SECTION I. SUMMARY OF THE CASE

Provide a brief summary of the case, including: (i) the date when the case was filed or the investigation commenced; (ii) the product or service at issue; and (iii) the basic theory of the case, such as product substitution, false certification, fraudulent allocation of costs, collusive bidding, etc. Provide a summary opinion on the strength of the case.

If the Acquisition Fraud Counsel recommends closing the remedies plan, then state specifically the reasons for closing the plan and discuss the fraud remedies that have been implemented and explain why other fraud remedies have not been implemented.

SECTION II. PROBABLE ADVERSE IMPACT

Identify the affected weapons systems or programs;

Discuss whether there is an adverse impact on safety of flight;

If there is an adverse impact on the safety of flight, then summarize the AFC's contact with the Air Force Safety Center Official;

If there is an impact on safety of flight, then discuss the immediate plan of action to address safety of flight issues.

SECTION III. ANALYSIS OF CONTRACT LAW ISSUES

Provide a detailed analysis of whether there is a breach of contract, including in the discussion all essential facts and legal theories. The analysis should describe with particularity all breaches of contract that support pursuit of remedies. The analysis should identify and, where appropriate, quote the relevant provisions of the contract in sufficient detail so that the reader can comprehend the analysis without reviewing separate documents. The analysis should be of a quality sufficient for inclusion in a brief filed with the court. The remedies plan should include a list of the key documents relevant to the analysis of the contract law issues.

SECTION IV. CONTRACTUAL REMEDIES

[13] If a lawsuit has been filed, then state the full caption of the case, including the jurisdiction and docket number.

Discuss in detail whether the Air Force can implement contract remedies and explain the plan for implementing those remedies.

SECTION V. ASSESSMENT OF DAMAGES

Discuss in detail the Air Force's damages, describing the methodology used to calculate those damages. Include in the discussion the status of relevant appropriation codes.

SECTION VI. FALSE CLAIMS ACT

Provide a recommendation on whether the evidence merits an action under the False Claims Act, 31 U.S.C. §3729, *et seq.* When making this recommendation, the Acquisition Fraud Counsel should consider the following elements:

A false claim for payment presented to the government OR A false statement in support of a false claim.
The defendant acted knowingly, meaning that the defendant acted 1) with actual knowledge of the falsity, or 2) with willful ignorance of the falsity; or 3) in reckless disregard of the truth.
The falsity was, or could have been, material to the government's decision to pay the claim.

SECTION VII. DETAILED PLAN FOR ASSISTING THE INVESTIGATIVE AGENCIES AND THE DEPARTMENT OF JUSTICE

Explain in detail the plan for assisting the investigative agencies and the Department of Justice. For example, cases involving product substitution or false certification of tests may require the assistance of engineers and similar experts, such as metallurgists. The remedies plan should explain the AFC's efforts to locate such experts within the Air Force. Defective pricing cases may require assembling and reviewing documents bearing on the negotiating history of the contract or contract modification. The remedies should explain the Air Force's efforts in assisting with the review. The remedies plan should explain specifically what actions the Acquisition Fraud Counsel has taken, and will take in the future, to assist in the investigation/litigation.

SECTION VIII. LITIGATION

Summarize the status of litigation or anticipated litigation, including but not limited to: (i) whether there is an indictment; (ii) the date for intervention in a *qui tam* lawsuit; (iii) the deadline for completing discovery; (iv) the status of settlement discussions; (v) the trial date; and (vi) whether there is parallel litigation at the ASBCA or Court of Federal Claims. If there is parallel litigation, the plan should discuss coordinating the litigation.

SECTION IX. SUSPENSION AND DEBARMENT

A. Has a suspension or debarment package been prepared? If not, then explain why not.

1. Explain the contracting officer's position on suspension and debarment.

2. Explain the program office's position on suspension and debarment.

B. Basis for suspension or debarment (check appropriate boxes)

□ Civil judgment for fraud, or indictment or conviction of crime in connection with a government contract or an offense showing a lack of business integrity

□ Violation of antitrust laws

□ Adequate evidence of the commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, false statements, tax evasion or receiving stolen property

□ Misusing "Made in America" inscription

□ Adequate evidence of the commission of offenses showing a lack of business integrity and honesty

□ Willful failure to perform in accordance with the terms of a contract

□ A history of unsatisfactory performance of one or more contracts

□ Failure to make a good faith effort to provide a drug-free workplace

□ Commission of an unfair trade practice as defined in section 201 of the Defense Production Act

□ Failure to comply with immigration laws

SECTION X. ACTIONS BY THE AFC

Describe specifically what the AFC has done during the period of time covered by the plan (or updates of the plan) to advance the progress of the case.

SECTION XI. ADMINISTRATIVE DATA

Date of plan:

Author(s) of the plan: [include telephone and fax numbers and email address]

Status of plan:

Initial or update (if "update," include revision number):

If closure is recommended, then explain why:

Contact information for investigators:

Contact information for Department of Justice lawyers:

Contact information for DCMA fraud counsel:

[SIGNED] Staff Judge Advocate

APPENDIX B

Format for Memorandum in Support of Proposed Debarment

[DATE]

MEMORANDUM FOR SAF/GCR
Richard Pelletier, Assistant Deputy
4040 North Fairfax Drive
Arlington, Virginia 22203
DSN 425-0049; DSN Fax 425-1045
Commercial 703-588-0049; Commercial Fax 703-588-1045

FROM: 82 TRW/JA
Sheppard AFB TX 76311-2935

SUBJECT: Legal Review Request for Debarment of Jamestown Contracting, Inc., and John Smith

We have reviewed the 82nd Contracting Squadron's recommendation for debarment of Jamestown Contracting, Inc. ("Jamestown") and John Smith and find it legally sufficient.

FACTS

On 10 May 1995, Sheppard AFB issued IFB Number 1001 pursuant to the Small Business Competitive Demonstration Program. On 10 June 1995, Sheppard AFB awarded contract number F1001 ("the Contract") to Jamestown. The contract was to renovate housing at Sheppard AFB, Texas.

The facts on which this recommendation for debarment are based were brought to the attention of HQ ARTC/JA in a memorandum from Captain Jennifer Marvel, a trial attorney with the Air Force Directorate of Contract Appeals, Wright-Patterson AFB, Ohio.

Contract No. F1001, dated 10 June 1995, required Jamestown to, *inter alia*, remove the floor covering from 100 houses in base housing. Jamestown subcontracted that portion of the contract to Roanoke for $50,000 on 10 July 1995. On 10 August 1995, Roanoke discovered that the floors in one of the units had more than one layer of asbestos material. Roanoke proposed removing the additional layer of asbestos for $1000. That same day, Jamestown notified the contracting officer that Jamestown's subcontractor, Roanoke, had encountered two layers of floor tiles in one of the housing units. Jamestown told the contracting officer that the two layers of floor tiles "will add to

the disposal of the material," but did not expressly request at that time an increase in the price of the Contract to remove the double layers of floor tiles.

On 20 August 1995, the contracting officer notified Jamestown that the Contract required removal of "all existing floor covering" and did not specify the removal of only one layer of flooring or, indeed, any specific number of layers. (Underscoring in original) On 30 August 1995, Jamestown told Roanoke that the Contract with the Air Force required removal of "all layers of tile" and that "means [Roanoke] has to do it." Thus, Jamestown declined to pay Roanoke an additional amount to remove the second layer of asbestos.

Later, Roanoke found two layers of floor tiles in nine other housing units, for a total of ten housing units having double layers of tile. The subcontract between Jamestown and Roanoke was not amended to increase the price of the subcontract to include the removal of two layers of floor tiles from the ten housing units. Furthermore, Roanoke did not charge Jamestown to remove the double layers of floor tiles from the ten housing units. At a subsequent trial before the ASBCA, John Smith, Jamestown's president, admitted under oath that Jamestown did not pay Roanoke an additional amount above and beyond the subcontract price to remove additional layers of floor tiles. Thus, Jamestown incurred no added costs from the removal of the double layers of floor tiles.

The fact that Jamestown incurred no added costs is shown by Jamestown's "All Cost Variance Report," dated 30 October 1995. According to John Smith's testimony before the ASBCA, the report showed the "progress on the job with costs to date and forecasts the variance of whether you're going over budget or under budget based on your current position on the project." At the time of Jamestown's All Cost Variance Report, Jamestown had completed the Contract with the Air Force, and the report showed Jamestown's final costs. The All Cost Variance Report showed that there was no variance between the price of Jamestown's subcontract with Roanoke and the amount that Jamestown owed Roanoke. Thus, the All Cost Variance Report showed that Jamestown had not incurred additional costs from the removal of two layers of floor tiles in the ten housing units.

On 30 November 1995, John Smith, on behalf of Jamestown, submitted to the contracting officer certified claims for reimbursement of additional costs, including additional costs of removing double layers of asbestos flooring. Even though Jamestown had not incurred additional costs from the removal of double layers of floor tiles in the ten units, nonetheless, Jamestown's certified claim demanded an additional $12,500 (including 10% profit and 15% overhead) to compensate Jamestown for the alleged cost of removing "additional layers of asbestos containing flooring material."

Roanoke never submitted a claim or invoice to Jamestown to be paid for removing the additional layers of floor tiles from the eight housing units. Nor did Roanoke authorize Jamestown to pursue a claim on behalf of Roanoke for compensation for the added cost of removing the double layers of floor tiles.

LEGAL ANALYSIS

This proposed debarment is forwarded pursuant to FAR 9.406-2(c) which provides that the debarring official may debar a contractor, based on a preponderance of the evidence, for "any other cause of so serious or compelling a nature that it affects the present responsibility of a Government contractor or subcontractor."

This case resulted from the testimony of witnesses at a trial before the ASBCA concerning claims filed by the contractor, Jamestown. Specifically, the contractor submitted a certified claim asserting that the contractor was entitled to compensation for payments that it allegedly made to a subcontractor for asbestos removal. In sworn testimony in ASBCA No. 48527, at a trial held between May 13-15, 1997, Jamestown's president and claim certifier, John Smith, admitted that Jamestown had not incurred any cost as a result of the asbestos removal, nor had it contacted anyone from Roanoke to discuss the claim or to act as Roanoke' representative for the claim. This fact was corroborated by the testimony of Roanoke' vice president and controller, who testified that Jamestown had not entered into any agreement with Roanoke to sponsor a claim against the government. This testimony, plus other documentary evidence, provides the basis for the recommendation for debarment.

After carefully reviewing the evidence, we believe that the evidence presented is sufficient by a preponderance of the evidence to support the debarment of Jamestown and John Smith. The fact that Jamestown filed a claim for payment to a subcontractor to which the subcontractor was not entitled and for which the subcontractor never made a claim is conduct of a serious nature that affects Jamestown's present responsibility as a government contractor.

RECOMMENDATION

The evidence is sufficient to conclude that Jamestown and John Smith attempted to receive $12,500 from the government by means of a falsely certified claim. Jamestown's conduct, and that of its president, is so compelling as to adversely affect their responsibility as government contractors. The submission of a falsely certified claim is serious and shows a lack of business integrity that is required of all government contractors. Based on their conduct, Jamestown and John Smith should be debarred from performing government contracts for a period of time commensurate with this offense.

[Signed]
Staff Judge Advocate

Enclosures
1) Captain Marvel's memorandum
2) Contracting officer's report

3) Jamestown's certified claim
4) Jamestown's claim summary
5) Relevant portion of the contract
6) Contracting officer's notes
7) Subcontract between Jamestown and Roanoke
8) Memo from Jamestown to Contracting officer
9) Contracting officer's memorandum to Jamestown
10) All Cost Variance Report
11) Excerpts of trial transcripts